164

VOLUME VIII.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 265

FEDERAL POWER COMMISSION AND ILLINOIS COMMERCE COMMISSION, PETITIONERS

vs.

NATURAL GAS PIPELINE COMPANY OF AMERICA AND TEXOMA NATURAL GAS COMPANY

No. 268

NATURAL GAS PIPELINE COMPANY OF AMERICA AND TEXOMA NATURAL GAS COMPANY, PETITIONERS

vs.

FEDERAL POWER COMMISSION AND ILLINOIS COMMERCE COMMISSION

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitions for certiorarj filed July 12, 1941, July 14, 1941

Certiorari granted October 13, 1941

IN THE

United States Circuit Court of Appeals

For the Seventh Circuit

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA AND TEXOMA NATURAL GAS COMPANY,

Petitioners,

vs.

FEDERAL POWER COMMISSION AND ILLINOIS COMMERCE COMMISSION,

Respondents.

Petition for Review of Interim Order of the Federal Power Commission.

INDEX.

Petition of the Illinois Commerce Commission, filed with the Federal Power Commission, September 23, 1938 1

Order of Federal Power Commission instituting Investigation, entered October 14, 1938..... 6

Answer of Natural Gas Pipeline Company of America and Texoma Natural Gas Company to Petition, filed November 16, 1938..... 9

Order fixing date of hearing, entered April 14, 1939... 13

PROCEEDINGS AT HEARING.

Statement by Examiner..... 15

Statement by Mr. Morgan..... 16

Colloquy 25, 33, 64

Statement by Mr. Booth..... 28

Statement by Mr. May..... 31

ABSTRACT OF TESTIMONY.

Witnesses for Federal Power Commission.

Testimony of:

Brown, Claude C.....35, 36

Knapp, Charles W., Jr.....2004, 2103, 2588

Smith, Charles W.....2041, 2222, 2632

Witnesses for Illinois Commerce Commission.

Testimony of:

Kleinman, Fred 2075, 2382

Ostrander, E. D.....1977, 2277

Woodford, John M.....57, 393

WITNESSES FOR DEFENDANTS.

Testimony of:

Biddison, P. McDonald.....1041, 1284
Brainard, W. F.....481
Brown, Floyd C.....491, 1311, 1636
Bulla, W. T.....987
Bussard, R. M.....715, 854, 1056
Campbell, S. E.....1003, 1398, 2554, 2637
Cooke, John A.....1446, 1909, 2616, 2669
Cottingham, V. E.....187
Davidson G. M.....1013, 1040, 1068, 1142
Davidson, W. H.....815
Delafield, Robert H.....1415, 1753, 2558, 2657
Dickinson, J. G.....613, 874, 1379
Dorau, H. B.....1512, 1636, 1788, 1965, 2527
Eastman, H. L.....1210
Emery, J. A.....1324, 1451, 1638, 1690, 1927
Foster, M. E.....1110
Galloup, Charles I.....453
Gill, Stanley.....361, 1024
Gillman, William C.....
.....1471, 1678, 1702, 1867, 2469, 2600, 2671
Hamilton, F. C.....1191, 1271
Hammerschmidt, E. G.....465
Hughes, C. Don.....315
Kesinger, E. V.....647, 2596
Miller, S. L.....1340, 1383
Palyi, Melchoir.....398
Parker, R. D.....249
Peterson, C. J.....192, 359
Powers, R. T.....767

Testimony of:

Smith, W. D. 1119
Solow, E. M. 1167, 1859
Stoddart, Frank W. 1259
Strong, R. G. 903
Taubman, Herman P. 1148, 1190
Thompson, J. D., Jr. 275
Wallace, R. J. 1341
Willard, J. L. 1240
Zwiener, K. V. 1367

EXHIBITS.

No.

3 Production and B.T.U. by Fields Texoma Company for year ending June 30, 1938 (F. P. C.) ..2673
4 Gas sold or delivered, Texoma Company for year ending June 30, 1938 (F. P. C.) 2674
5 Texoma Company Consolidated Operating Analysis, etc. (F. P. C.) 2675
6 Texoma Company earnings analysis, 1934 to 1938, inc. (F. P. C.) 2676
7 Natural Gas Company gas sold or delivered by companies for year ending June 30, 1938 (F. P. C.) 2677
8 Natural Gas Company report of purchased gas and cost, 1934 to 1938, inc. (F. P. C.) 2679
9 Natural Gas Company consolidated operating analysis of gas purchases and sales, 1934 to 1938, inc. (F. P. C.) 2681
10 Natural Gas Company Sales and Revenue, 1934 to 1938, inc. (F. P. C.) 2683
11 Natural Gas Company Sales Agreements on file with Federal Power Commission (F. P. C.) 2685

No.	Exhibits.	
14	Map showing delivery points and Natural Gas Transmission Lines (F. P. C.)	2687
15	Natural Gas Company and Texoma Company Earnings Statements, Calendar Years to December 31, 1938 (I. C. C.)	2689
28	Natural Gas Reserves — Texas Panhandle (Defts.)	2756
36	Natural Gas Reserves — Texas Panhandle (Defts.)	2757
41	Natural Gas Reserves — Texas Panhandle (Defts.)	2759
43	Explanation of Reserve Calculations (Defts.)	2760
44	Details of Reserve Estimate Marginal Gas Acreage—Texas Panhandle Field (Defts.)	2767
53	Errata—Exhibit No. 15 (I. C. C.)	2771
54	Natural Gas Company and Texoma Company Balance Sheets, December 31, 1934 to 1938, inc. (I. C. C.)	2771
78	Picture showing assembly of two 18-inch gas lines upon a suspension bridge across Big Blue River in Moore County, Texas (Defts.)	2783
79	Two photographs: Canadian River crossing in Hutchinson County, Texas, and typical manifold for submerged river crossing (Defts.)	2785
84	Map showing distances of Panhandle, Michigan and Illinois Fields from Chicago (Defts.)	2787
85	Photographs of Scenes at Pipeline Break near Sheffield, Illinois (Defts.)	2789
86	Statement of Open Flows and Rock Pressures on Date Wells were abandoned. Eldorado & Augusta Fields—Butler County, Kansas (Defts.)	2801

Vol. I, pp. 1 to 646; Vol. II, pp. 647 to 1310; Vol. III, pp. 1311 to 1976; Vol. IV, pp. 1977 to 2672; Vol. V, pp. 2673 to 3032; Vol. VI, pp. 3033 to 3417; Vol. VII, pp. 3419 to 3902; Vol. VIII, pp. 3903 to 4023.

No.	Exhibits.	
92	Picture of Compressor Station No. 1 (Defts.)	2803
114	Regulatory Expense (Defts.)	2805
116	General Expense, Taxes, New Business Expense (Defts.)	2806
117	Summary of Additional Capital Expenditures and Operation and Maintenance (Defts.)	2819
122	Salvage Value as of December 31, 1954 (Defts.)	2841
	Non-Salvageable Property not listed in Exhibit 122	1143
123	Picture Showing Interior of Fritch Station and 12 Engines (Defts.)	2907
124	Errata Sheets for Exhibit 122 (Defts.)	2911
125	Volumes I and II of Valuation (Portions of) (Defts.)	2922
129	Personnel Data—Key men in Chicago Office. etc. (Defts.)	2927
130	Cost of Attaching Business (Defts.)	2943
131	Market Value of Leases (Summary Sheet) (Defts.)	2947
132	Quotations and Yields of U. S. Treasury Notes and Bonds at Close of Market on August 15, 1939 (Defts.)	2951
133	Average Yield obtainable from Investments in U. S. Notes and Bonds (Defts.)	2953
134	Explanation of Method Used in Determining Reserves as of 8/1/31, on Acreage owned by Texoma 1/1/39 (Defts.)	2955
136	Earnings Statements for Calendar Years 1932 to 1938, inclusive (Defts.)	2958
137	Balance Sheets and Statements of Plant and Equipment December 31, 1931 to December 31, 1938, inclusive (Defts.)	2989

No.	Exhibits.	
138	Statement of Operating Revenue and Expenses, etc. (Defts.)	3003
140	Earnings Statement covering entire life of Project (Defts.)	3021
141	Earnings Statement based on Book Cost as of January 1, 1939 (Defts.)	3025
142	Earnings Statement based on Reproduction Cost new less existing depreciation as of June 1, 1939 (Defts.)	3029
145	Reconciliation of Statement Included in Exhibits 136 and 15 (Defts.)	3033
146	Texoma Natural Gas Company Summary of Market Value of Leases (Defts.)	3069
147	Natural Gas Co. and Texoma Co. Data concerning Rate of Return, etc. (Defts.)	3071
148	Natural Gas Co. and Texoma Co. Data concerning Rate of Return—Year 1938 (Defts.)	3079
149	Estimated Earnings on Account of Increased Capacity and Delivery of Natural Gas when operating at Higher Pipe Stresses (Defts.)	3105
150	Natural Gas Co. and Texoma Co. Data concerning Rate of Return (Defts.)	3106
151	Photostat of Investment Treatises (Defts.)	3123
152	Natural Gas Co. and Texoma Company Data concerning Rate of Return (Defts.)	3141
154	Article by Paul Ryan, "The Natural Gas Industry an Expanding Service" (F. P. C.)	3305
155	Facing Sheet and Pages 4 and 5 from 1st amendment to Registration Statement of Public Service Co. of Colorado, filed with S. E. C. 12/10/38 (F. P. C.)	1880, 3314

No.	Exhibits.
156	Certified copy of Gallagher's Exhibits 2 and 2A covering estimate of Investment and Anticipated Average Annual Net Earnings relative Docket 21170 before Illinois Commerce Commission (I. C. C.) 3320
	Exhibit 2—Estimate of Investment in Facilities for Production of Natural Gas in Texas, etc. 3321
	Exhibit 2A—Revised page 1 of Exhibit 2... 3333
157	Certified copy of Gallagher's testimony before Illinois Commerce Commission in connection with Exhibit 2 of Commerce Commission and covering Pages 12 to 99, inc. of record in case No. 21170 (I. C. C.)..... 3335
158	Facing Sheet and Page 62 from 1st amendment to Registration Statement of Public Service Co. of Colorado filed with S. E. C. 12/10/38 (F. P. C.) 3374
159	Facing Sheet and Pages 5 and 6 from Registration Statement of Public Service Company of Colorado filed with S. E. C. 8/30/39 (F. P. C.)... 3379
160	Facing Sheet and Page 57 of Registration Statement of Public Service Company of Colorado filed with S. E. C. 8/30/39 (F. P. C.)..... 3385
161	Release No. 1667 of S. E. C. under Holding Company Act containing findings and opinion re Northern Natural Gas Co. (F. P. C.)..... 1884, 3390
162	Letter of Ralph E. Davis, Inc. to Northern Natural Gas Co. dated 6/1/39 re Natural Gas Reserves (F. P. C.)..... 1885, 3401

No.	Exhibits.	
163	Pages 8, 9, 10 from Registration Statement filed with S. E. C. by Panhandle Eastern Pipeline Co. covering Ralph E. Davis Production Property and Gas Reserves (I. C. C.)	3408
167	Exhibit 49 in case of Chgo. District Pipeline Co. v. Lindheimer, et al., comparing present market price of issuance of Natural Gas Bonds (F. P. C.)	3413
168	Poor's Public Utility Volume 1939—Pages 164-167, inclusive (F. P. C.)	3419
169	Pages a55 to a61, inclusive of Moody's Manual of Investments 1939 (F. P. C.)	3428
170	Page 250 from American Gas Association Monthly, August, 1939, "Expanding Markets for Gas Industry Make Investments Sound," by P. S. Young (F. P. C.)	3458
171	Pages 19-20-37 from "Gas"—July, 1939, article by Percy S. Young entitled "The Investment Attributes of Gas Utility Securities" (F. P. C.)	3460
172	Pages 251-255 of American Gas Association Monthly issue of July-August, 1939, article, "A Banker Analyzes Natural Gas Industry Investment Values," by Frank R. Denton (F. P. C.)	3468
173	Pages 37, 38, 43 of "Gas," May, 1939, issue, article, "A Stock Broker Analyzes the Natural Gas Industry," by John Nickerson III (F. P. C.)	3471
174	Pages 56-61, incl. from 1939 Autumn issue of "The Index" article, "The Gas Industry" (F. P. C.)	3477

Vol. I, pp. 1 to 646; Vol. II, pp. 647 to 1310; Vol. III, pp. 1311 to 1976; Vol. IV, pp. 1977 to 2672; Vol. V, pp. 2673 to 3031; Vol. VI, pp. 3032 to 3417; Vol. VII, pp. 3419 to 3902; Vol. VIII, pp. 3903 to 4023.

No.	Exhibits.	
176	Pages 253-255, incl. from issue of July-August, 1939, of American Gas Association Monthly article, "The Fifth Big Job," by Charles R. Bellamy (F. P. C.)	3486
178	Pages 24-33 from January, 1939, issue of "Gas" article, "The Natural Gas Industry Provides Opportunities for Investment," by James S. Carroll (F. P. C.)	3492
179	Statistical Bulletin No. 37 of American Gas Association dated October, 1939, entitled "Annual Statistics of the Natural Gas Industry in 1938" (F. P. C.)	3496
180	Trends of Interest Rates and Bond Yields (I. C. C.)	3523
181	Summaries of Recent Financing by Natural Gas Systems (I. C. C.)	3535
182	Computations in Regard to the Sinking Fund Method of Amortization and Rate of Return on Net Investment (I. C. C.)	3553
183	Money Market Factors (I. C. C.)	3559
184	Exhibit 20, entitled "Details of Items of Expense in Operation of a Single Pipe Line from Texas to Joliet, Illinois and certain misc. data," in Peoples Case before Ill. Comm. Com. No. 21170 (I. C. C.)	3567
185	Rate of Return Study—Part I (F. P. C.)	3576
186	Rate of Return Study—Part II (F. P. C.)	3724
187	Comparative Statement of Combined Profit and Loss for 8 months ended August 31, 1939 and 1938 (I. C. C.)	3784

No.	Exhibits.	
188	Proforma Comparative Balance Sheets Annually at Dec. 31 from 1939 to 1954 and after liquidation (I. C. C.)	3785
191	Revision of Chart 8 and Supporting Schedule No. 12 in Exhibit 185 (F. P. C.)	3841
192	Revision of Chart 10 and Supporting Schedule No. 14 in Exhibit 185 (F. P. C.)	3849
193	Revision of Chart 11 and Supporting Schedule No. 15 in Exhibit 185 (F. P. C.)	3855
195	Revision of Chart No. 12 of Exhibit 185 (Defts.)	3859
196	Revision of Chart No. 14 of Exhibit 185 (Defts.)	3863
197	Study of Yields at Market Prices of Electric Operating Utility Preferred Stock and number of times dividend and prior requirements are earned, Based on Market Prices for week ended Nov. 17, 1939—Income for latest 12 months (F. P. C.)	3867
198	Earnings—Price Ratios of Electric Operating Utility Common Stocks and Per Cent of Gross Income available for common stocks, market prices for week ended Nov. 17, 1939, annual income from latest quarterly reports (F. P. C.)	3869
201	Photostat of Voucher 55810 (6/21/38) $5105.15 to Ralph E. Davis, Inc. (F. P. C.)	3871
202	Data on Sales, Revenue and Customers—Peoples Gas Lt. and Coke Co. (Defts.)	3877
203	Residential Electric Service in United States (Defts.)	3885
204	Commonwealth Edison Co. (Customers, Consumption, Revenue, and Rate) (Defts.)	3885

Vol. I, pp. 1 to 646; Vol. II, pp. 647 to 1310; Vol. III, pp. 1311 to 1976; Vol. IV, pp. 1977 to 2672; Vol. V, pp. 2673 to 3031; Vol. VI, pp. 3032 to 3417; Vol. VII, pp. 3419 to 3902; Vol. VIII, pp. 3903 to 4022.

No. Exhibits.

205 All Mortgage Bonds of Domestic Electric and Gas Utility Companies traded on New York Curb September 15, 1939 (Defts.).....3886

206 All Preferred Stocks of Domestic Electric and Gas Operating Utilities paying full dividends Listed N. Y. Curb (Sept. 15, 1939, Prices) (Defts.).....3888

207 Gross Operating Revenue and Total Net Available for Fixed Charges After Depreciation of the Gas Departments of the Three Utilities Distributing Gas in the Chicago Area (Defts.).....3891

208 Gas, Electric and Telephone Utility Companies serving City of Chicago (Defts.).....3893

209 Bonds, Debentures and Notes of Natural Gas Companies holdings by public (Defts.).....3895

210 Revision of Page One in Exhibit No. 141 (Defts.).....3901

211 Revision of Page One in Exhibit No. 142 (Defts.).....3902

Motion for Interim Order reducing rates, filed November 7, 1939.....3903

Defendants' Pleas to Jurisdiction and Reply to motion for Interim Order filed December 18, 1939.....3914

Conditional Answer to motion for Interim Order, etc., filed Dec. 18, 1939.....3920

Memorandum Opinion, filed July 23, 1940.....3925

Order reducing rates, entered July 23, 1940.....3942

Motion for stay of order of July 23, 1940, filed August 8, 1940.....3947

Objections of Illinois Commerce Commission to motion for stay of order, filed August 9, 1940.....3958

Order granting in part and denying in part motion for stay of order of July 23, 1940, entered August 8, 1940 3960
Application for Rehearing, filed August 16, 1940..... 3961
Order denying Rehearing, entered September 6, 1940.. 3993
Certificate to Record..... 3994

PAPERS FILED IN U. S. COURT OF APPEALS.

Petition for Review, filed September 11, 1940..... 3997
Statement of Points..... 4009
Stipulation as to Printing..... 4020
Supplemental Stipulation as to Printing..... 4022

I

Order staying order of Commission 4025
Opinion, Evans, J 4026
Judgment 4041
Clerk's certificate 4042
Orders allowing certiorari 4043

2821 UNITED STATES OF AMERICA. Filed Nov. 7, 1939.

FEDERAL POWER COMMISSION.

Illinois Commerce Commission, *Complainant,*
vs.
Natural Gas Pipeline Company of America,
and
Texoma Natural Gas Company, *Defendants.*
} Docket No. G-109.

In the Matter of
Natural Gas Pipeline Company of America,
and
Texoma Natural Gas Company.
} Docket No. G-112.

MOTION FOR AN IMMEDIATE ORDER REDUCING RATES.

Come now, John E. Cassidy, Attorney General of the State of Illinois, by Harry R. Booth, Assistant Attorney General, for and on behalf of the complainant, Illinois Commerce Commission, and George Slaff, of Counsel for the Federal Power Commission, with whom is D. A. Myse, in the above entitled cause, who respectfully represent as follows:

1. That on September 23, 1938 a petition was filed by the Illinois Commerce Commission praying that a citation be issued directing the defendants herein to show cause why the rates charged for natural gas in the State of Illinois should not be reduced and further that an order be entered setting fair, just and reasonable rates for such natural gas.

2. That on October 14, 1938 this Honorable Commission on its own motion ordered an investigation to enable the Commission to determine whether the rates and charges of the defendants are unjust or unreasonable and if so to fix by appropriate order or orders just and reasonable rates or charges.

3. That on November 16, 1938 the defendants filed their

answer to the petition denying that their rates or charges were unreasonable or unjust and also contesting the jurisdiction and power of this Commission to enter any order or orders such as to affect the rates or charges of the defendants.

2822 4. That on April 14, 1939 this Commission entered an order consolidating the two cases, G-109 and G-112, for the purpose of hearing, and fixing May 8, 1939, as the date of the first hearing.

5. That hearings were begun on May 8, 1939 at Chicago and have since continued for approximately 55 days during which a total of approximately 8000 pages of testimony has been taken, 37 witnesses have appeared for the defendants, who introduced 135 exhibits, and 6 witnesses, and approximately 45 exhibits have been introduced for the two Commissions.

6. That for the purpose of this proceeding, Natural Gas Pipeline Company of America and Texoma Natural Gas Company consider themselves, and are here treated, as a single enterprise and will hereafter collectively be referred to as "the Companies."

7. That from a consideration of all the evidence it appear:

I. Earnings 1932—1938.

a. That the evidence on behalf of the Companies shows total actual income available for return and for amortization of investment, after payment of operating expenses and taxes during the entire past period (seven years) of operation, to date of January 1, 1939, in the amount of at least $53,405,092 ("Revenue Remaining for Amortization and Return," Exhibit 140, p. 1, line 14); that during the same period a total of $19,558,810 was charged to operations for amortization of investment, consisting of $11,620,210 (Ex. 136) on account of depreciation, $1,457,278 on account of depletion, and in addition, $6,481,322 for retirements beyond what was charged against the depreciation and depletion reserves; and that deducting the total charges of $19,558,810 from the $53,405,092 of income leaves $33,846,282 for return on investment during the period or an average of $4,835,183 per annum, after all charges for depreciation, depletion and retirements. That, at the end of 1938 the Companies' depreciation and depletion reserve was $12,557,892 (Exhibit 137).

b. That the cost of the plant, including gas leaseholds, at the beginning and end of each of the seven years, as claimed by the Companies, is as follows (Ex. 137):

2823	Beginning	End
1932	$ 61,113,958	$ 61,804,730
1933	61,804,730	59,632,173
1934	59,632,173	59,533,555
1935	59,533,555	60,029,067
1936	60,029,067	59,529,749
1937	59,529,749	59,436,823
1938	59,436,823	59,197,843
	$421,080,055	$419,163,940
7-Year Average		$60,017,428
Working Capital (Ex. 140)		975,000
		$60,992,428

c. That said average plant cost, together with working capital, amounted to approximately $61,000,000 for the 7-year period, which sum is subject to reduction on account of depreciation and depletion for which purpose the Companies have built up reserves and for which they themselves make deductions from the plant cost figures for the amount of depreciation and depletion that they admit has occurred (Ex. 141); that the $4,835,183 average annual return for the 7 years amounts to substantially 8 per cent per annum on $61,000,000, without any deductions from the latter amount; and that for the last year, 1938, the net earnings from operations ($9,884,745, Ex. 136), after depreciation charges of $1,978,408, depletion charges of $261,658, and retirements of $992,567, amounted to $6,652,112, or approximately 11 per cent on the plant cost, plus working capital, without deducting any part of the depreciation and depletion reserves of $12,557,892.

d. That the total net profit available to the stockholders after payment of bond interest and amortization of bond discount and expense was at least $8,244,436 (Ex. 136) for the 7 years, amounting to an average of $1,177,777 per annum, or an annual average return of 39.3 per cent on the $3,000,000 capital stock of the Natural Gas Pipeline Company of America.

e. That the bonds represent practically the entire investment, claimed by the Companies, aside from the de-

preciation and depletion reserves, as is shown by the following table:

Dec. 31	Bonds (1) (Ex. 137, p. 1)	Reserves (2) (Ex. 137, p. 1)	Total (1) & (2) (3)	Plant (Undepreciated) (4) (Ex. 137, p. 1)
1931	$59,999,000	—	$59,999,000	$61,113,958
1932	59,999,000	$ 1,582,988	61,581,988	61,804,730
1933	60,999,000	3,139,028	64,138,028	59,632,173
1934	58,999,000	4,800,408	63,799,408	59,533,555
1935	56,499,000	6,507,066	63,006,066	60,029,067
1936	52,599,000	8,233,048	60,832,048	59,529,749
1937	50,300,000	10,458,256	60,758,256	59,436,823
1938	46,500,000	12,557,892	59,057,892	59,197,843

2824 f. That from the above table it appears that on December 31, 1933 the total bonds outstanding stood at $60,999,000, or more than the total in the plant account; and that thereafter bonds have been retired, while depreciation and depletion reserves have been accumulated, so that the bondholders, who are also the stockholders, have been paid back a very substantial proportion of their capital out of depreciation and depletion funds.

g. That if the gross investment claimed by the two companies, without deductions for retirements or for accrued depreciation and depletion, be taken as a base for the purpose of entering an immediate order, operations should be charged with annual amortization on a sinking-fund basis.

h. That the minimum sinking-fund interest rate should be 6 per cent; that the interest rate on the Companies' bonds is 6 per cent; that the Companies are actually retiring their bonds; and that a portion of the amortization funds could properly be invested in additions to the property and credited with the rate of return which is to be earned on the property.

i. That the computation of the amortization annuity should be at least on the basis of semi-annual compounding of interest, as the bond interest is paid semi-annually and as semi-annual compounding is in accordance with the testimony of the Companies' witness Delafield (R. 5166).

j. That in accordance with the Companies' own estimate of the life of their property the minimum period for amortizing the investment is 23 years; that the annual amount required to amortize one dollar at the end of 23

years at 6 per cent interest compounded semi-annually is $0.020725.

k. That the gross investment, without deduction of any retirements, claimed by the Companies to have been theretofore made, and including working capital, stood at $67,173,761 at the end of 1938 (Ex. 140, p. 1, line 19); that $1,392,176 per annum ($67,173,761 x 0.020725) would amortize this amount over the 23-year life of the enterprise, disregarding salvage; and that the Companies' esti-
2825 mate of the total capital expenditures for the entire 23-year period, less salvage, which amounts to $78,284,009 (Ex. 140) could be amortized by an annual allowance of $1,622,436 ($78,284,009 x 0.020725) which amount, set aside annually for 23 years at 6 per cent interest compounded semi-annually, will accumulate the total of $78,284,009.

m. That taking this amount, $1,622,436, in lieu of the charges made by the Companies in the first 7 years for depreciation, depletion and retirements, the result is as follows:

Investment at 1/1/32 (Ex. 137)	$ 61,113,958
Plus working capital	975,000
	$ 62,088,958
Gross investment to 12/31/38 including working capital (Ex. 140)	67,173,761
	$129,262,719
Average Investment	$ 64,631,360
Average revenue remaining for amortization and return (Ex. 138, p. 1)	$ 7,629,299
Amortization	1,622,436
Amount available for return	$ 6,006,863
Per cent on average investment	9.3%

II. Estimated Earnings for 1939-1941 Inclusive.

a. That the amount of $1,622,436 is more than ample annual amortization provision for the 16 years following January 1, 1939, as compared with the 7 years prior to that date, because the Companies have actually provided for more amortization in the past 7 years than would have resulted from the above charge; that the sinking fund that would result from an annual charge of $1,622,436 for 7

years is $13,860,471, whereas the Companies have actually charged $19,558,810 against operations for depreciation, depletion and retirements, and still have made more than ample return as heretofore shown; and that the Companies in the past 7 years have retired $14,499,000 of their 6 per cent bonds, which amount is substantially greater than the sinking fund of $13,860,471 which would have resulted from the investment of $1,622,436 in the Companies' bonds for 7 years; and that in addition to retiring the above amount of bonds the Companies paid a total of $9,150,000 in dividends (Ex. 136) on $3,000,000 of capital stock.

2826 b. That based upon the annual amortization figure of $1,622,436, and using the Companies' estimates of earnings available for amortization and return, the income available for return in the years 1939 to 1941 inclusive, will be at least:

	1939	1940	1941
Total capital expenditure & working capital at beginning of year (Ex. 140)	$ 67,173,761	$ 68,091,587	$ 69,414,046
End of year (Ex. 140)	68,091,587	69,414,046	70,708,776
	135,265,348	137,505,633	140,122,822
Average	67,632,674	68,752,817	70,061,411
Revenue available for amortization & return (Ex. 140)	$ 9,790,310	$ 9,564,228	$ 9,400,483
Amortization	1,622,436	1,622,436	1,622,436
Income available for return	$ 8,167,874	$ 7,941,792	$ 7,778,047
Per cent on average gross investment (above)	12.1%	11.5%	11.1%
6% on average gross investment	$ 4,057,960	$ 4,125,169	$ 4,203,685
Excess over 6%	$ 4,109,914	$ 3,816,623	$ 3,574,362
Excess over 6½%	$ 3,771,750	$ 3,472,859	$ 3,224,055

c. That based upon the highest charges made by the Companies in any one year for depreciation ($2,034,754 in 1937, Ex. 136) and for depletion ($320,527, in 1937), and also charging against operations the entire amount of retirements, less salvage, estimated by the Companies for 1939 ($209,484, less salvage of $50,832, or $158,652, Ex. 117)—although a large but unknown part of the retirements would actually be charged against the depreciation reserve—the income for 1939 would be as follows:

Estimated revenue remaining for amortization and return (Ex. 140, p. 2, line 14)		$9,790,310
Less: Depreciation	$2,034,754	
Depletion	320,527	
Retirements	158,652	2,513,933
Income available for return		$7,276,377

d. That the cost of property as shown by the Companies' exhibits remaining at January 1, 1939, to wit, $59,197,843, plus working capital of $975,000, gives a total of $60,172,843; that the charges made by the Companies in the past for depreciation and depletion, less retirements that have been charged to the reserve, have resulted in reserves of $12,557,892 at the same date; that a maximum investment rate base would be the difference between these amounts, or $47,614,951, which is approximately one million dollars more than the outstanding bonds; that this difference will diminish as the reserve accumulations grow; and that on the total of $60,172,843, without any deductions for depreciation or depletion, the net earnings for 1939, to wit, $7,276,377, as set forth in paragraph "C," just preceding, will be not less than 12.1 per cent, and that such earnings will produce a return of $3,666,006 more than 6 per cent or $3,365,142 over 6½ per cent on said total of $60,172,843.

e. That although the Companies estimated as recently as September 8, 1939 (Exs. 136, 140) that the net earnings for 1939 would be less than the net earnings for 1938, the books of the Companies disclose a substantial gain in both gross revenues and net earnings for the first 8 months of 1939 compared with the corresponding period in 1938, as is indicated by the following table:

	8 Months Ended Aug. 31, 1939	Aug. 31, 1938	Increase or Decrease*
Gross Earnings from operations	$10,460,897.18	$9,457,471.97	$1,003,425.21
Operating Expenses	3,233,293.23	3,032,386.72	200,906.51
Net Earnings from Operation	$ 7,227,603.95	$6,425,085.25	$ 802,518.70
Non-Operating Income	677.76	12,877.82	12,200.06*
Net Earnings of Company	$ 7,228,281.71	$6,437,963.07	$ 790,318.64
Less: Other Charges			
Interest Expense	$ 1,819,056.36	$1,956,759.25	$ 137,702.89*
Amortization of Bond Discount and Expense	170,167.32	170,167.32	—
Depreciation	1,358,804.20	1,208,667.22	150,136.98
Depletion	189,549.89	165,598.40	23,951.49
Retirement Expense	205,920.14	680,971.50	475,051.36*
Total Other Charges	$ 3,743,497.91	$4,182,163.69	$ 438,665.78*
Net Earnings Available for Dividends	$ 3,484,783.80	$2,255,799.38	$1,228,984.42
Dividends	1,500,000.00	1,687,000.00	187,000.00*
Balance	$ 1,984,783.80	$ 568,799.38	$1,415,984.42

(*) Negative Amounts.

f. That included in the Companies' figures of property cost at January 1, 1939 is the amount of $9,367,364 for cost of gas leaseholds at that date, which amount is subject
2828 to deductions for depletion; that the Companies' witness, R. J. Wallace, testified to a present value of the leaseholds, in their depleted condition, of $13,334,775 (Ex. 131, revised by Ex. 146); that if this figure be substituted for the investment figure of $9,367,364, and if only the depreciation of $2,485,079 which defendants deduct from the original cost of property, other than leaseholds (Ex. 141), is deducted from the cost of such other property, a total of $61,655,175 is obtained; and that the net earnings of $7,276,377 for 1939 are 11.8 per cent of $61,655,175, or $3,577,066 in excess of 6 per cent, or $3,268,791 in excess of 6½ per cent.

III. Return Based upon the Companies' Reproduction Cost Estimate.

a. That on the basis of their reproduction cost estimate the Companies will earn not less than $3,211,661 above a 6 per cent return for 1939, using the Companies' own charges for depreciation and depletion, charging also to operations the entire amount of retirements, less salvage, estimated by the companies for the current year 1939, and deducting from reproduction cost new only the "viewed" depreciation as testified to by Company witness, Biddison, amounting to $2,866,758 (Exs. 125, 142) as compared to the depreciation reserve of $11,405,038 (Ex. 137):

Reproduction Cost New, excluding Gas Reserves (Ex. 142)			$56,302,250
Less Viewed Depreciation			2,866,758
			$53,435,492
Gas Reserves (Ex. 146)			13,334,775
Working Capital (Ex. 125)			975,000
Reproduction Rate Base			$67,745,267
Income for Depreciation, Depletion and Return, 1939 (Estimated) (Ex. 140)			$ 9,790,310
Less: Depreciation		$2,034,754	
Depletion		320,527	
Retirements, total for 1939 (Ex. 117)	$209,484		
Less Salvage	50,832	158,652	2,513,933
			$ 7,276,377
Per Cent on Rate Base			10.7%
6 Per Cent on Rate Base			$ 4,064,716
Excess over 6 per cent			$ 3,211,661
Excess over 6½ per cent			$ 2,872,935

2829 b. That 6 per cent on the above rate base would cover the entire bond interest of $2,790,000 on the bonds outstanding at January 1, 1939 (which will be further

reduced) and the annual amortization of bond discount and expense of $255,251 (Ex. 136) and still leave $1,019,465 for the stockholders or 34 per cent on the $3,000,000 stock of Natural Gas Pipeline Company.

c. That the net earnings available for return, with the annual amortization allowance of $1,622,436 sufficient to amortize the Companies' estimate of total investment of $78,284,009 over the life of the project, will show the following results, using an undepreciated reproduction cost rate base:

Reproduction cost new (excluding gas reserves)	$56,302,250
Gas reserves	13,334,775
Working capital	975,000
Rate base	$70,612,025
Income for depreciation, depletion and return	$ 9,790,310
Less amortization	1,622,436
	$ 8,167,874
Per cent on rate base	11.6%
6 per cent on rate base	$ 4,236,722
Excess over 6 per cent	$ 3,931,152
Excess over 6½ per cent	$ 3,578,092

d. That no separate allowance should be made for going value.

IV. Rate of Return.

a. That a fair rate of return for these Companies is not more than 6 to 6½ per cent.

V. Relationship of Gross Reduction to Reduction in Net Earnings.

a. That a reduction in gross revenue of $3,000,000, or any other amount, would not cause a similar reduction in net earnings since the net taxable income would be reduced, thus reducing Federal income taxes; that based upon the Federal income tax rate of 18 per cent under

the Revenue Act of 1939 the tax saving due to a reduction of $3,000,000 in gross revenue without change in expenses would be $540,000, so that the net earnings would be reduced by only the difference, or $2,460,000.

2830 8. That Sections 4(a) and 5(a) of the Natural Gas Act provide as follows:

Section 4(a)—

"All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

Section 5(a)—

"Whenever the Commission, after a hearing * * * shall find that any rate * * * or * * * any * * * contract affecting such rate * * * is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. * * *"

9. That the evidence before the Commission now clearly establishes that the present rates charged and collected by the Natural Gas Pipeline Company of America are unjust and unreasonable.

10. That the Companies have had a full and complete hearing; that counsel for the Companies stated on October 6th that their case on direct had been completed (R. 5974).

11. That cross examination of Companies' witnesses, the introduction of complainant's evidence and evidence on behalf of the Federal Power Commission, the taking of Companies' rebuttal evidence and cross examination thereon will consume much additional time so that the closing of this case will be delayed for a long time in the future.

12. That to aid the complainant materially in fixing fair and reasonable rates for gas sold to ultimate consumers in the State of Illinois it is necessary that an immediate interim order be entered reducing the rates and charges of Natural Gas Pipeline Company of America.

13. That nothing herein contained is to be taken as an admission of the accuracy or propriety of any of the claims made by the Companies or their witnesses.

2831 Wherefore, your petitioners pray that the Commission enter an immediate interim order fixing just and reasonable rates for gas sold by Natural Gas Pipeline Company of America.

John E. Cassidy,
Attorney General, State of Illinois,
Attorney for Illinois Commerce
Commission, Complainant.

Harry R. Booth,
Assistant Attorney General,
of Counsel.

George Slaff,
Of Counsel for Federal Power Commission.

D. A. Myse,
Attorney.

Filed Dec. 18, 1939.

2832 December 18, 1939.

UNITED STATES OF AMERICA.

FEDERAL POWER COMMISSION.

(Caption—G-109 and G-112)

DEFENDANTS' PLEAS TO THE JURISDICTION OF THE COMMISSION IN REPLY TO MOTION FOR AN INTERIM ORDER REDUCING RATES.

Now come the defendants-respondents, hereinafter styled defendants, in response to the "Motion for an Immediate Order Reducing Rates" filed herein by John E. Cassidy, Attorney General of the State of Illinois, and Harry R. Booth, Assistant Attorney General, on behalf of the Illinois Commerce Commission, the latter hereinafter called complainant, and by George Slaff, of counsel for the Federal Power Commission, and D. A. Myse, attorney for the Federal Power Commission, the latter hereinafter styled the Commission, and present their several pleas to the jurisdiction of the Commission to grant said motion or to enter an interim order reducing the prices and charges of defendants for natural gas.

I.

2833 Defendants renew the plea to the jurisdiction of this Commission contained in Paragraphs 6 and 7 of their original answer to the complaint filed with the Commission by complainant, Docket G-109, and say that the Commission has no power or authority to enter any order attempting to change, modify or set aside any charge or price at which Natural Gas Pipeline Company of America is selling gas to Chicago District Pipeline Company or to other utilities in the State of Illinois or elsewhere, or to substitute and prescribe any different charges or prices for such commodity, or in any way to deprive defendants of their privileges under contracts entered into by defendants with those purchasing natural gas from them at wholesale prior to the enactment of the Natural Gas Act.

Defendants again show that they in legal effect and in fact constitute a single enterprise engaged in the business of owning natural gas leases or reserves in the State of Texas, developing such reserves, producing gas therefrom, and transporting their own gas through their own pipeline facilities to points in the States of Kansas, Nebraska, Iowa and Illinois, and selling such commodity at wholesale to selected distributors and industrial consumers under private contracts; that under the terms of said contracts, defendants, prior to the enactment of the Natural Gas Act, by agreement fixed the prices and charges at which their gas has been and is being sold at wholesale; that under the terms of said contracts, defendants, prior to the enactment of the Natural Gas Act, dedicated their
2834 reserves, their pipelines, and their facilities to the performance of their obligation to sell and deliver gas to the respective parties to such contracts; that the enterprise or business of defendants is of a strictly private character, not affected with a public interest in the sense that Congress would have jurisdiction or authority to enact legislation purporting to authorize the Commission to regulate the charges or prices for which their natural gas is sold; and the Natural Gas Act, in so far as it purports to confer on the Commission any jurisdiction, power or authority to regulate or change such prices, and any rules, regulations and orders of the Commission attempting to exercise any such purported jurisdiction, are null and void as against these defendants, because the inevita-

ble operation and effect thereof would be to deprive defendants of their property and liberty of contract without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

II.

The Commission has no jurisdiction under the Natural Gas Act to reduce the rates or prices at which defendants are selling natural gas, by interim order or otherwise, pending the final termination of the proceedings and hearings now being conducted and held by the Commission, through its Examiner, and not then unless and until, after the conclusion of the hearing and after defendants have had an opportunity to be heard in their briefs and argument on the facts presented by the record and the law applicable thereto, the Commission shall find that the rates and prices charged and collected by the de-
2835 fendants are unjust, unreasonable, unduly discriminatory or preferential.

In this connection defendants show that they and the other parties to said proceeding are in the midst of the hearing now being conducted and held in the consolidated proceedings under the above titles and docket numbers; that the hearing now in progress began on May 8, 1939, and has continued since that date, numerous sessions having been held in the city of Washington and in the city of Chicago. On October 6, 1939, defendants announced that they had completed their direct testimony; but defendants now have the right, which they propose to exercise, to examine their witnesses who have heretofore testified, after they shall have been examined by counsel for complainant and the Commission, for the purpose of developing such additional facts on redirect as may appear necessary and proper in the premises, to cross-examine the witnesses who shall be called to testify against defendants by complainant and by counsel for the Commission, to offer such explanation and clarification as they deem proper of any facts or circumstances which may be presented to the Examiner by complainant and counsel for the Commission in the course of the hearing as a result of the investigation now in progress, and to offer substantial original testimony in rebuttal.

Counsel for complainant and the Commission have both stated in open hearing that they have additional cross-

examination of defendants' witnesses and that they propose to offer testimony on the issues involved in this proceeding. Representatives of complainant and the
2836 Commission are now examining defendants' records and properties in an effort to develop additional testimony to support the contention of complainant and counsel for the Commission herein. The transcript of the oral testimony heretofore received in evidence now embraces approximately 10,000 pages, and more than 200 exhibits, some of which contain several hundred pages of data and material, have already been offered in evidence. Among the exhibits are numerous maps and charts which can only be understood after a careful analysis of the testimony of the witnesses in connection with whose testimony the exhibits were introduced.

Numerous issues of fact are presented by the record and on these issues there is sharp difference of opinion and contention between defendants on the one hand and complaint and counsel for the Commission on the other hand. Numerous important and serious questions of law are raised by the record. These issues of fact and of law cannot be resolved and determined by the Commission until after the hearing has been finally terminated and until defendants have had an opportunity by brief and argument to present their contentions on the issues both of law and of fact first to the Examiner and then, if necessary, to the Commission as a whole. The prices and charges of defendants for natural gas which complainant and counsel for the Commission seek to reduce by interim order were fixed by contracts negotiated and entered into by
2837 defendants and their several purchasers long prior to the enactment of the Natural Gas Act. The contracts under which such prices and charges were fixed have been filed with the Commission in pursuance of the Natural Gas Act, whereupon they became and now are legal and lawful rates, the reasonableness of which was established prima facie upon the filing of such contracts with the Commission.

Under the facts above stated the Commission is without jurisdiction to reduce the charges and prices fixed by defendants' contracts until, after hearing, it shall find from the evidence and record as a whole that such rates and charges are unjust, unreasonable, unduly discriminatory or preferential. Under the established law defendants are entitled not only to introduce their own direct testimony but to cross-examine the witnesses who appear against

them, to explain and clarify any facts or circumstances which complainant and counsel for the Commission seek to use against defendants, to interrogate their witnesses on redirect examination for the purpose of developing and elaborating upon the testimony of such witnesses on direct and cross examination, and to rebut by original testimony the testimony which may be offered through witnesses called by complainant or counsel for the Commission. Under the terms of the Natural Gas Act the Commission is without authority and jurisdiction at this stage of the proceeding to enter a finding or undertake to enter a finding that the existing charges and prices for which defendants sell their natural gas are unjust, unreasonable, unduly discriminatory or preferential, and it will have no juris-
2838 diction to make such a finding until defendants have been heard by brief and oral argument on the entire record heretofore developed and to be developed on all of the issues bearing on the question of whether their prices and charges are unjust, unreasonable, unduly discriminatory or preferential.

In the proceedings to determine whether or not defendants' charges and prices are unjust, unreasonable, unduly discriminatory or preferential, the Commission is performing quasi judicial functions, and these functions must have been fully discharged upon the full record, and only in the event that the Commission shall then find that the charges and prices of defendants are unjust, unreasonable, unduly discriminatory or preferential would the Commission have jurisdiction and power under the Natural Gas Act to enter any order reducing the rates and charges fixed by the contracts under which defendants sell their natural gas.

III.

The Natural Gas Act confers upon the Commission no power or jurisdiction to enter an interim order pending the final termination of the hearing and an opportunity by defendants to be heard, by brief and by oral argument, on the law and the facts presented by the whole record, and in the absence of such statutory authority an interim order reducing defendants' rates and charges would be null and void for want of jurisdiction.

IV.

The Commission is without authority to entertain the motion for an interim order for the reason that there
2839 is a fatal defect of parties having authority to present and prosecute such motion. Complainant is a State board or commission created by statute enacted by the legislature of the State of Illinois, with its authority and powers limited to those expressly conferred under the terms of the statute. There is no law or statute of the State of Illinois conferring upon complainant any power or authority to appear as a litigant before the Federal Power Commission or any other Federal board or commission except the Interstate Commerce Commission. Messrs. George Slaff, of counsel for the Commission, and D. A. Myse, attorney for the Commission, appear in this record as counsel and attorney, respectively, for the Commission. Any act that they perform, therefore, is necessarily performed on behalf of the Commission, and this Commission, through its counsel or otherwise, cannot appear as a litigant or movant before itself sitting in its quasi judicial and quasi legislative capacity. Such a proceeding would constitute the Commission both the litigant and the judge, and such a proceeding would deny defendants due process of law, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and any order entered in pursuance of such a proceeding would be null and void.

Wherefore, defendants pray that upon hearing their several pleas to the jurisdiction of the Commission be sustained and that the motion for an immediate order reducing rates be dismissed or denied.

2840

J. J. Hedrick,
George P. Garver,
D. H. Culton,
S. A. L. Morgan,
All of 20 North Wacker Drive,
Chicago, Ill.,
Attorneys for Natural Gas Pipeline Company of America and Texoma Natural Gas Company, Defendants.

Morgan, Culton, Morgan & Britain,
Of Amarillo, Texas,
Of Counsel.

Filed Dec. 18, 1939. 2841 December 18, 1939.

UNITED STATES OF AMERICA.

FEDERAL POWER COMMISSION.

• • (Caption—G-109 and G-112) • •

CONDITIONAL ANSWER OF DEFENDANTS TO THE MOTION FOR IMMEDIATE ORDER REDUCING RATES FILED BY COMPLAINANT AND COUNSEL FOR THE COMMISSION.

Without waiving their several pleas to the jurisdiction of the Commission to enter an interim order or any order reducing defendants' prices and charges for natural gas, but still insisting on each of said pleas, and subject only to a final order and judgment overruling each of said pleas to the jurisdiction, the defendants-respondents, hereinafter styled defendants, come now and file their answer and reply to the "Motion for an Immediate Order Reducing Rates" filed herein by John E. Cassidy, Attorney General of the State of Illinois, and Harry R. Booth, Assistant Attorney General, on behalf of Illinois Commerce Commission, the latter hereinafter called complainant, and by George
2842 Slaff, of counsel for the Federal Power Commission, and D. A. Myse, attorney for the Federal Power Commission, the latter hereinafter styled the Commission.

I.

The entry by the Commission of an interim order reducing defendants' rates and charges, as suggested in said motion, prior to the final conclusion of the hearing now pending and without a full consideration by the Commission of the complete record developed and to be developed at said hearing, including the exhibits heretofore offered in evidence and to be hereafter offered in evidence, would manifestly operate to violate the rights of defendants to a full hearing on the primary issue in this proceeding, namely, the question of whether or not the existing prices and charges of defendants for natural gas are unjust, unreasonable, unduly discriminatory or preferential, and to deprive defendants of due process of law.

The record of the hearing now in progress contains approximately 10,000 pages of oral testimony and more than 200 exhibits, consisting of maps, charts and tabulations, some of which contain several hundred pages and all of which must be read carefully in connection with the testimony of the witnesses through whom such exhibits were introduced. Only a few of the numerous witnesses who have testified for the defendants have been cross-examined, and complainant and counsel for the Commission have called to the witness stand only five or six witnesses whom defendants have had an opportunity to cross-examine.

Complainant and counsel for the Commission have
2843 both announced that they propose to cross-examine defendants' other witnesses and to themselves offer witnesses and exhibits against the contentions of the defendants in this cause. Defendants have a right to examine their own witnesses further on redirect after they are cross-examined by complainant and counsel for the Commission, to cross-examine the witnesses subsequently to be produced by complainant and counsel for the Commission, and to offer testimony in rebuttal of the testimony of the witnesses who testify against them. It is the purpose of defendants to exercise their right and to cross-examine the witnesses who will be called to testify against them, to re-examine their own witnesses after they have been cross-examined by complainant and counsel for the Commission, and to offer substantial rebuttal testimony. They have the right, which they expect to exercise, to offer such explanation and clarification as may be necessary to explain any facts or circumstances which may be developed as a result of the investigations now pending by representatives of complainant and the Commission into the records and affairs of defendants.

The evidence in these proceedings has been heard, and doubtless will be heard hereafter, by an Examiner designated by the Commission. There has been no closing of the evidence and no report of the Examiner with proper and reasonable opportunity to the defendants to lodge exceptions to the Examiner's report should they desire to do so. The members of the Commission have not read, and would find it utterly impracticable to read and under-

take to digest, the voluminous testimony and exhibits
2844 which have been offered in this cause.

Defendants' prices and charges are based upon contracts executed prior to the enactment of the Natural

Gas Act, and no order affecting such prices and charges entered prior to a consideration in due order of proceedings of the entire record heretofore developed and to be hereafter developed would be authorized or valid, whether same be a final or an interim order.

II.

The proponents of the motion wholly disregard the various elements which must be considered by the Commission in forming a judgment with respect to the primary question of whether or not defendants' prices and charges are unjust, unreasonable, unduly discriminatory or preferential, and the entry of an order at this time, prior to a full and complete hearing on the record as it now stands and on the record as it shall hereafter be developed through the cross-examination of defendants' witnesses and through other witnesses to be offered by defendants and by complainant and counsel for the Commission, would be a violation of the rights of defendants under the process clause of the Fourteenth Amendment to the Constitution of the United States.

The proponents apparently assume that the Commission has authority to determine whether or not the prices and charges of defendants for natural gas are unjust, unreasonable, unduly discriminatory or preferential by merely showing that a reduction in the existing prices and charges would not result in confiscation of defendants' prop-
2845 erty. Defendants deny and challenge the contention of the proponents of the motion that any reduction in their prices and charges would not result in confiscation. However, the Commission is required to determine from all the evidence adduced at the hearing and to be hereafter adduced whether or not defendants' prices and charges are unjust, unreasonable, unduly discriminatory or preferential, and before it can enter any order changing such prices and charges there must first be a finding from all the evidence that the prices charged under defendants' contracts are, under all the circumstances, unjust, unreasonable, unduly discriminatory or preferential. The return to the defendants on the fair value of their property is only one element to be considered by the Commission in first determining whether or not such prices are unjust, unreasonable, unduly discriminatory or preferential. A

finding that such prices are unjust, unreasonable, unduly discriminatory or preferential must be made by the Commission after a full hearing to final conclusion on all the issues of fact and of law, and any interim order reducing defendants' prices and charges prior to such a finding would manifestly deprive defendants of due process of law, in violation of the Fourteenth Amendment.

III.

Defendants deny the conclusions contained in the fact allegations set out in the motion. They say that in making such allegations the proponents of the motion have
2846 wholly misconstrued defendants' evidence and contentions. They have improperly combined certain features of defendants' exhibits addressed to different angles of the case. They have wholly disregarded the existing law as to what constitutes the rate base upon which the rate of return regulated concerns are entitled to earn shall be calculated, and have wholly disregarded the testimony of numerous witnesses who have testified for defendants on the various facts and elements which the Commission must consider in arriving at a proper rate base and a proper rate of return. They have assumed a right in the Commission to enter an order, in the midst of a hearing the primary object of which is to determine whether or not defendants' prices and charges are unjust, unreasonable, unduly discriminatory or preferential, arbitrarily and prematurely reducing the prices and charges of defendants for natural gas.

IV.

The record as already made affirmatively presents sharp conflicts between defendants on the one hand and complainant and counsel for the Commission on the other hand as to numerous issues of fact and of law which the Commission can determine only after full hearing and after consideration of the entire record. Some, but not all, of these issues are those going to historical cost of defendants' properties, book cost of defendants' properties, book value of defendants' properties, reproduction cost new less viewed depreciation, fair value, depreciation, the allow-

ance for amortization, the risks inherent in the busi-
2847 ness in which defendants are engaged, the peculiar risks confronting the particular enterprise of defendants, a fair rate of return and all of the elements and factors which must be considered in connection with arriving at a fair rate of return, the prices at which defendants' gas is sold for the various uses to which it is put, and the value of defendants' gas at the places which the same is marketed as compared with the prices charged by others selling natural gas at wholesale under similar circumstances. All of these issues present also serious and important questions of law which the Commission must weigh and consider before it can arrive at any finding or conclusions as to the primary issue, which it, in its quasi judicial capacity, must determine before it would have any authority to reduce the prices and charges of defendants for natural gas.

Defendants are entitled to a full and complete hearing on all of these questions, including the right to be heard on all the issues of fact and of law by brief and oral argument before the Examiner, to a report accompanied by recommendations by the Examiner to the Commission thereon, to the right to file exceptions to such report should they deem it proper and necessary to do so, and to present their exceptions by brief and oral argument to the Commission.

Premises considered, defendants pray that said motion be dismissed or in any event denied.

2848 J. J. Hedrick,
George P. Garver,
D. H. Culton,
S. A. L. Morgan,
All of 20 North Wacker Drive,
Chicago, Ill.,
Attorneys for Natural Gas Pipeline Company of America and Texoma Natural Gas Company, Defendants.

Morgan, Culton, Morgan & Britain,
Of Amarillo, Texas,
Of Counsel.

2849 UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION.

Opinion No. 49.

• • (Caption—G-109 and G-112) • •

2850 Appearances:

For the Illinois Commerce Commission: John E. Cassidy, Esq., Harry R. Booth, Esq.

For the Natural Gas Pipeline Company of America and Texoma Natural Gas Company: Joseph J. Hedrick, Esq., S. A. L. Morgan, Esq., D. H. Culton, Esq., George P. Garver, Esq.

For the Federal Power Commission: George Slaff, Esq., Daryal A. Myse, Esq.

2851 UNITED STATES OF AMERICA

Filed July 28, 1940.

FEDERAL POWER COMMISSION.

Opinion No. 49.

• • (Caption—G-109 and G-112) • •

MEMORANDUM OPINION.

BY THE COMMISSION:

The Illinois Commerce Commission, on September 23, 1938, filed a petition with this Commission alleging that the rates and charges for natural gas charged by the above named defendants-respondents (operated as a single enterprise and so treated herein) were unjust and unreasonable and prayed that said companies be required to show cause why rates for natural gas sold by them in the State of Illinois should not be reduced and that an order be entered determining fair, just, and reasonable rates for the wholesale sale of natural gas sold by them. Copies of this complaint were duly served on defendants-respondents on October 14, 1938. On the same date this Commission, on its own motion, ordered an investigation to determine whether the rates of said com-

panies were unjust and unreasonable and if so, fix just and reasonable rates therefor. The rates in question have a substantial effect on the cost of gas to ultimate consumers in Chicago and the surrounding area, as the bulk of the natural gas sold by defendants-respondents is delivered to the Chicago District Pipeline Company, which, in turn, supplies all the natural gas used by utilities serving the area.

On November 16, 1938, the defendant-respondent companies filed their answer to the complaint. On April 14, 1939, this Commission entered an order consolidating the complaint case and the investigation for purposes of hearing. Thereafter, hearings were begun on May 8, 1939, and continued from time to time until October 6, 1939, during which a total of approximately 6000 pages of testimony was taken. Fifty-seven witnesses appeared and testified for the defendants-respondents and offered in evidence 135 exhibits. On October 6, 1939, in response to a question by the Trial Examiner, counsel for the defendants-respondents stated of record that the companies had concluded direct testimony in support of their case. Thereafter, beginning on October 23, 1939, the witnesses of the companies who had testified on the specific subject of rate of return were cross-examined by counsel for the two commissions for a period of twelve days and testimony of two witnesses on the subject of rate of return was then presented by counsel to this Commission and testimony of two witnesses on the same subject was offered of record by counsel for the Illinois Commerce Commission.

2852 At the conclusion of the direct testimony on November 7, 1939, counsel to both commissions joined in filing a written motion for an interim order reducing the rates and charges of the defendant-respondent companies. Copies of said motion were duly served upon defendants-respondents. At that point in the proceedings the hearings had extended over fifty-five days, approximately 8000 pages of testimony had been taken, and, in addition to the witnesses and exhibits heretofore mentioned as being submitted on behalf of the companies, six witnesses had testified and approximately forty-five exhibits had been introduced of record by the Illinois Commerce Commission and the staff of this Commission...

Subsequent to the service of the motion for an interim

order reducing rates upon defendant-respondent companies, hearings were held beginning November 27, 1939, and extending through December 12, 1939, during which period of time counsel for defendants-respondents cross-examined at length the witnesses of both commissions who had testified on the subject of rate of return and in addition there was presented redirect and rebuttal testimony by said companies.

On December 18, 1939, after notice upon all interested parties, oral argument on the motion for an interim order was held before the Commission sitting en banc. This argument occupied a full day and was participated in at length by counsel representing the defendants-respondents, the Illinois Commerce Commission, and this Commission. Thereafter, briefs were filed by counsel representing all parties interested in the proceedings.

On December 19, 1939, we entered an order reconvening these proceedings for hearing to be commenced on January 8, 1940, so that the defendant-respondent companies might have further opportunity to present additional rebuttal testimony dealing with the issue of a proper rate of return and also to afford them opportunity to cross-examine one of the Commission witnesses who had previously given redirect testimony. The order fixing this hearing also granted defendant-respondent companies twenty days after the conclusion thereof within which to file briefs. Hearings were held on January 8, 9, and 10, 1940, at which time defendant-respondent companies presented of record additional rebuttal and redirect testimony. Although briefs were due to be filed on January 30, 1940, counsel for said companies requested a thirty-day extension of time within which to file their briefs and by order of this Commission, dated January 23, 1940, an extension of time for the filing of defendant-respondent briefs was given to February 15, 1940.

It is not the purpose of this memorandum opinion to deal exhaustively with every minute question involved in these proceedings. Suffice it to say that this matter is presently before us on the joint motion of counsel to this Commission and the Illinois Commerce Commission
2853 filed November 7, 1939, for an immediate interim order fixing just and reasonable rates for the interstate sale of natural gas for resale made by defendants-respondents. The record now before us is over 10,000

pages in length and over 200 exhibits have been introduced therein.

The motion does not set out specifically the amount of reduction which is requested. It does, however, allege that a fair rate of return for the defendant-respondent companies is not more than 6 to 6½ per cent. It also sets out alleged net earnings of the companies on various bases which exceed a 6 per cent return by from approximately $3,250,000 to approximately $4,110,000 and which exceed a return of 6½ per cent by from $2,870,000 to approximately $3,770,000. The brief of the Illinois Commerce Commission requests an order reducing rates by not less than $3,500,000. The brief of counsel to this Commission requests that rates be reduced at least by an amount of from $3,370,000 to $3,725,000.

The motion for an interim order alleges that the evidence before the Commission now clearly establishes that the present rates of the defendant-respondent companies are unjust and unreasonable and it is prayed that an immediate order be entered fixing just and reasonable rates. The defendants-respondents have filed a plea to the jurisdiction of the Commission in reply to the motion and a conditional answer thereto. We observe that all counsel have dealt exhaustively with the problems here involved and their briefs have been of material assistance to us.

Contentions of the defendant-respondent companies may be summarized as follows: (a) that the companies are private in character; that this Commission has no jurisdiction to regulate them; and that the Natural Gas Act, in so far as it attempts to give this Commission power to regulate the companies, is unconstitutional; (b) that the Commission has no jurisdiction under the Natural Gas Act to enter the interim order sought by the motion now pending before us until all the companies' witnesses have been cross-examined by counsel to the Illinois commission and to this Commission and shall have been examined on redirect, and until this Commission and the Illinois commission shall have presented all their witnesses and such witnesses have been cross-examined and the companies have offered rebuttal testimony; (c) that the Natural Gas Act confers upon this Commission no power or jurisdiction to enter the order sought; and (d) that the Commission is without authority to entertain the motion for

an interim order since the Illinois commission has no power to appear before this Commission, and counsel to this Commission have no power to make the motion since their action in doing so places the Commission in the position of "litigant or movant before itself sitting in its quasi-judicial and quasi-legislative capacity," and any action taken by this Commission under such circum-
2854 stances would violate the rights of defendants-respondents under the Fourteenth Amendment to the United States Constitution.

In addition, the defendants-respondents state that a finding of unreasonableness of rates at this time would violate the companies' rights under the Fourteenth Amendment, deny the conclusions contained in the factual allegations set out in the motion for interim order (however, there is no denial at any place of the facts themselves which are set out in the motion), and conclude that there is sharp conflict as to numerous issues of fact and law which cannot be determined at this time.

Counsel to this Commission ask that for the purpose of disposing of the motion for an interim order we accept the following:

(1) *The companies' estimate* of the life of their source of supply, to-wit: 23 years, 1932 to 1954, inclusive.

(2) *The companies' claim* that they will go out of business when this specific source of supply is exhausted.

(3) *The companies' book figures* for capital expenditures to date.

(4) *The companies' estimate* of the total gross capital expenditures over the period 1932 to 1954, inclusive.

(5) The highest present rate base figure for the companies' actual properties *testified to by the companies' witnesses.*

(6) *The companies' estimate* of revenue and operating expenses for the next few years embracing the reasonably immediate future.

It is to be noted that counsel to this Commission state in their brief:

"With respect to each one of these basic matters, it is our position that evidence already in the record or yet to be introduced by Commission witnesses indi-

cates facts much more favorable to the consumers of gas than the Companies' evidence on these points. Nevertheless, as stated, we propose that the Commission accept the foregoing matters exactly as testified to by the Companies' witnesses."

The motion presently before us poses the question: Can we, upon the record at this time, determine just and reasonable rates to be hereafter observed by defendant-respondent companies and fix the same by order?

The fundamental problem concerning our ability to fix just and reasonable rates upon the record now before us involves answers to these questions: (a) Has this Commission jurisdiction? (b) Have the constitutional requirements of due process been met, namely, has a full and fair hearing been afforded defendants-respondents? (c) Can we grant the relief prayed in the motion for an interim order at this interlocutory stage in the proceedings? (d) Assuming that (a), (b), and (c) are answered in the affirmative, from a substantive standpoint, upon the record before us, what are just and reasonable rates to be observed by defendants-respondents and to be fixed by order of this Commission?

2855 The Commission has Jurisdiction.

At the threshold of this discussion let us dispose of the claim of defendants-respondents that we are without authority to regulate the rates involved herein because their business is contractual and private in character. This contention is without merit. The companies are engaged in the interstate transmission and sale of natural gas for resale for ultimate public consumption. Congress has determined that such business is affected with a public interest. Moreover, in line with well-settled doctrine, we determined in our opinion in re *Mississippi River Fuel Corporation*, Docket No. G-150, that contracts such as here involved must yield to regulation.

Section 4(a) of the Natural gas Act provides:

"All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable,

and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

This section requires that rates and charges be just and reasonable and declares that *any such rates that are not just and reasonable are unlawful.* Section 5(a) provides that:

> "Whenever the Commission, *after a hearing* * * * *shall find that any rate* * * * or contract affecting such rate * * * *is unjust, unreasonable,* unduly discriminatory, or preferential, *the Commission shall determine the just and reasonable rate,* charge, classification, rule, regulation, practice, or contract *to be thereafter observed* and in force, *and shall fix the same by order* * * *." (Emphasis supplied.)

Due Process has been Afforded Companies.

On reviewing the entire proceedings before us, it is obvious that defendants-respondents have had a full and fair hearing.[1] The record discloses the companies have been accorded and have properly taken advantage of every opportunity to present all reasonably essential evidence that they desired with respect to every factor bearing on both the jurisdictional and substantive aspects of the problem before us. Moreover, they have had full opportunity to present oral argument and file briefs and in fact have made unmistakably clear their position with respect to every single issue involved in these proceedings.

2856 It is quite apparent that the defendant-respondent companies have presented all evidence that they

1. It is interesting to note that prior to the commencement of proceedings before this Commission the companies involved herein were engaged in substantially similar proceedings before the Illinois Commerce Commission. Some time during 1936 and 1937 the Illinois commission instituted an investigation against Chicago District Pipeline Company, which purchased substantially ninety per cent of the gas sold by the defendants-respondents. In February, 1938, the companies involved in this proceeding intervened in the proceeding before the Illinois Commerce Commission and participated in those proceedings although they did not offer affirmative evidence therein. During the pendency of the proceeding before the Illinois commission, the Natural Gas Act was passed. Thereafter, the Chicago District Pipeline Company and the companies involved herein, then interveners in the proceeding before the Illinois commission, moved that commission to suspend its proceedings on the ground that under the Natural Gas Act the jurisdiction to pass upon, and if necessary, regulate the prices and charges for natural gas sold at wholesale by the companies became vested exclusively in the Federal Power Commission.

deemed pertinent upon the question of fairness and reasonableness of their rates. The record discloses that throughout the hearings the Trial Examiner was extremely liberal in permitting the introduction of evidence by the companies. Moreover, the companies have had a full opportunity, which they have exercised, to cross-examine all witnesses offered so far by counsel to either commission and to offer all rebuttal testimony in explanation and clarification which they desired with respect to the testimony of such witnesses. They have had full opportunity, which they have exercised, to develop whatever facts they chose on redirect examination of such of their witnesses as have been cross-examined. However, they cannot be heard to complain that they have not yet been able to examine on redirect their own witnesses who have not yet been cross-examined, nor is it essential to a full hearing on the motion before us that they be permitted to cross-examine or rebut witnesses who have not yet been offered by counsel for the commissions.

The record amply supports our conclusion that the defendant-respondent companies have had a full and fair hearing. We are satisfied that the constitutional requirements of due process have been met. Our view finds complete support in the *New England Divisions Case*, 261 U. S. 184, wherein various western carriers asserted that the action of the Interstate Commerce Commission was void in increasing the divisions or shares of the New England carriers in joint through freight rates by fifteen per cent and, correlatively, decreasing the amounts received from the joint rates by carriers operating west of the Hudson River.[2] One of the principal grounds on which the western carriers rested their claim that the action of the Interstate Commerce Commission was void was stated by the Court as follows:

> "It is asserted that the order directs a transfer of revenues of the western carriers to the New England carriers, pending a decision in the matter of divisions; that Congress has not granted authority to take such provisional action; and that, hence, the

2. The applicable sections of the Transportation Act, Section 1(4) and Section 15(6), dealing with just and reasonable divisions of rates and the power of the Interstate Commerce Commission to prescribe just and reasonable divisions when, after full hearing, the existing divisions were unjust or unreasonable, closely parallel Sections 4(a) and 5(a) of the Natural Gas Act.

order is void. The argument is, that under Section 15(6), the Commission may prescribe divisions only when, upon full hearing, it is of opinion that those existing are, or will be, unjust unreasonable or inequitable; that in such event it shall prescribe divisions which are just, reasonable and equitable; and that the provisional character of the order demonstrates that the hearing has not been a full one. Whether a hearing was full, must be determined by the character of the hearing, not by that of the order entered thereon. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. The commission recognized, and observed, these essentials of a full hearing."

2857 The Supreme Court upheld completely the order of the Interstate Commerce Commission. Whether a full hearing was granted depended not on the order entered by the Commission but on the character of the hearing, the Court stating:

"There was thus ample time for, and every carrier was, in fact, afforded the opportunity of, introducing any and all evidence it desired.

* * * * *

"A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made."

We deal only briefly with the contention of defendant-respondent companies that we are without authority to entertain the motion because there is a fatal defect of parties having authority to present and prosecute the motion now before us. The Illinois Commerce Commission is a "State commission" as defined in Section 2(8) of the Natural Gas Act. As such, it is entitled, in our opinion, to file the complaint presently before us and to make the request set forth in the motion for interim order. To conclude that counsel to this Commission are unable to join in the motion would be to subscribe to a paralysis of the administrative process not consonant with

the duties involved in the administration of the Act. Therefore, we cannot agree that there is a fatal defect of parties before us which precludes us from acting upon the motion.

Interim Order Justified.

Having found that the defendant-respondent companies have been afforded a full hearing, let us turn to the question: Are we without authority to grant the affirmative relief prayed for in the motion for an interim order? An examination of the motion and record before us discloses that the movants do not call upon us to exercise power similar or comparable to that granted by the New York and Pennsylvania statutes to the regulatory bodies in those States whereby they may prescribe temporary rates upon the basis of much less evidence than that deemed to be necessary for the determination of final rates and wherein each of those commissions is authorized to prescribe a return upon a rate base to yield not less than a specific per cent fixed by statute, namely, five per cent.[3] Under the New York and Pennsylvania statutes there is no necessity for a full hearing with respect to determination of a fair rate of return for the purpose of prescribing temporary rates. In contrast thereto, in the instant proceedings, there has been a full and fair hearing upon the issue of a fair rate of return and there is an acceptance by the movants, for the purpose of this motion, of the testimony of defendants-respondents of the

2858 *"highest present rate base figure for the Companies' actual properties testified to by the Companies' witnesses," together with the companies' estimates of revenue and operating expenses, the life of their source of supply of natural gas, book figures for capital expenditures to date, the total gross capital expenditures over the period 1932 to 1954, inclusive, and other factors essential in presently determining the problem before us.*

It is obvious, therefore, that we are not called upon to perform a function comparable to that delegated by the statutes of New York and Pennsylvania to the regulatory bodies of those States. We are, however, implored to recognize an unpalatable situation, and to apply thereto the affirmative grant of authority delegated to us by the

3. Section 114 of the Public Service Law of New York and Section 310 of the Pennsylvania Utility Act.

Congress under Sections 4(a) and 5(a) of the Natural Gas Act which plainly require that interstate wholesale rates and charges for natural gas be just and reasonable and declare that *any such rates that are not just and reasonable are unlawful.* In fact, there is a definite direction in Section 5(a) to the effect that if, after hearing, we find any rate or contract affecting a rate to be unjust or unreasonable, *we "shall determine the just and reasonable rate, charge," etc., "and shall fix the same by order."* Thus, the most casual reading of the Act, in the light of its broad purposes, negatives the idea that we are inhibited from granting the relief sought by the motion for an interim order and forcibly emphasizes the duty of this Commission to grant such relief when, as in the instant case, from a factual standpoint, the record is ripe for the application of the express provisions of the Act.

There are those who will be rendered unhappy by the frustration of their ambition to maintain the excessive rates presently charged by defendant-respondent companies. But to refuse a substantial reduction thereof would require us to sit, aloof from reality, and permit unlawful rates to exist without affording those suffering thereby any relief. Inaction on our part would indicate that we had fallen into a mental trap not in keeping with our responsibilities.

2859 The Assumed Rate Base.

The defendant-respondent companies claim a rate base computed as follows:

Reproduction Cost New exclusive of Gas Reserves	$56,302,250
Less "Viewed" Depreciation	2,866,758
Present Value of Physical Properties exclusive of Gas Reserves	$53,435,492
Present Value of Gas Reserves	$13,334,775
Allowance for Future Capital Expenditures	6,046,286
Going Value	8,500,000
Working Capital	975,000
Total	$82,291,553

For the purpose only of disposing of the problem presented by the motion before us, we reluctantly accept the companies' estimate of reproduction cost, their claimed present value of gas reserves, and also their claim for working capital. We cannot, however, even for the purpose of an interim order, accept the full claim for future capital expenditures or the amount sought for going value. It is our opinion, because of the use of the sinking fund method of amortizing the entire investment, which we are presently approving for the purpose of this motion, no deduction from the companies' estimate of reproduction cost new is being made for depreciation. It is generally agreed that where the sinking fund method of depreciation is employed (amortization of investment is used in the instant case in lieu of depreciation and depletion), an undepreciated rate base is proper.[4]

It is contended by the companies that during the period from June 1, 1939, to December 31, 1954, when they estimate their sources of gas supply will be exhausted, they will expend for capital improvements the total sum of $9,145,083. However, this entire sum is not claimed as a part of the rate base but only $6,046,286 thereof is sought by applying the principle of average investment. Obviously, the improvements have not yet been made. They are contemplated in the future. It is clear, therefore, that such improvements are not used and useful in the present and to a certain extent must be deemed conjectural. We agree that in fixing rates for the future reasonable estimates of property additions in the immediate future should be taken into consideration. We are of the opinion that the estimate of additions for the period June 1, 1939 to December 31, 1942, is ample for the purpose of disposing of the motion now before us. The companies' estimate for this period is $3,808,399. This amount we allow.

2860 The companies' claim of $8,500,000 for going concern value must be disallowed. The amount obviously is an arbitrary claim, not supported by substantial evidence warranting its allowance. Its allowance would mean the acceptance of a deceptive fiction, resulting in an unfair imposition upon consumers. We are convinced that we

4. See *Telephone and Railroad Depreciation Charges*, 177 I. C. C. 351, 410; *Los Angeles Gas and Electric Co. v. Railroad Commission of California*, 289 U. S. 287, 298.

are allowing in our rate base more than an adequate amount to cover all elements of value.

In disposing of the motion for interim order, we are accepting at this time the companies' estimates of

Reproduction Cost New of Physical Properties (exclusive of Gas Reserves)	$56,302,250
Value of Gas Reserves	13,334,775
Capital additions for the period June 1, 1939 to December 31, 1942	3,808,399
Working capital	975,000
Total Rate Base	$74,420,424

The foregoing amount allowed as a rate base may be compared with book cost of properties, plus working capital of $975,000, as of December 31, 1939, totalling $60,952,279, and therefrom it is clearly disclosed that the rate base presently allowed herein is liberal. This appears especially true when the period of construction is taken into consideration.

Amortization.

The companies have introduced evidence relating to the amortization of the investment in, or claimed value of, their properties. Ordinarily, depletion and depreciation are recognized items of expense of natural gas producing and transmission companies, but because of the alleged very limited life of the gas supply in these proceedings, amortization is claimed, and is allowed, in lieu thereof. Evidence was introduced by the companies, as well as by counsel for the Commission, relative to the sinking fund method of amortization and, for our present purposes, we will accept that method.

The defendants-respondents claim that the present fair value, including estimated value of estimated future capital additions, should be amortized over the remaining estimated life of the gas reserves available to them. We believe that the total investment, in contradistinction to claimed fair value, should be amortized and that the amortization period should be the total estimated life of the business, namely twenty-three years, rather than the remaining life, fifteen years.

The amounts of amortization are recognized and treated as operating expenses. Operating expenses are stated on

the basis of cost. There is no more reason to compute amortization expense on the basis of the fair value or reproduction cost of property than there is to substitute fair value of reproduction cost for all other expenses, such as labor, materials and supplies, etc. In our opinion, the method allowed will, with proper management, return the companies their full and complete investment in their properties by the time their business is estimated to
2861 end, with adequate compensation on the claimed fair value of the properties (less the disallowances mentioned above) in the interim. We refuse to make an allowance of amortization in excess of cost. To do so would not be the computation of a proper expense, but instead the allowance of additional profit over and above a fair return. Manifestly such an additional return would unjustly penalize consumers.

The amortizable investment is the total investment estimated to be made during the life of the companies, less the salvage value at the end thereof. For the purpose of disposing of the motion before us we accept the claim of the companies that this investment will amount to $78,284,009, inasmuch as the amount subject to amortization is the total investment during the life of the enterprises, it follows that the amortization period should be the same period, namely twenty-three years (from 1932 to 1954).

The record discloses that evidence was introduced showing the applicability of the sinking fund method of amortization to the facts herein. The companies claim the interest rate in the sinking fund formula should not exceed two per cent. However, we feel that 6½ per cent should be used. Where an interest rate lower than the allowed rate of return is used, unjust enrichment of the companies at the expense of the consumers is a most likely result. Under the sinking fund method, consumers are given no credit by way of a reduced rate base for the amortization expense

2862 Rate of Return.

The record before us clearly discloses that a great amount of testimony was devoted to the question of rate of return. There has been extensive and detailed cross-examination of all witnesses who testified specifically on the subject on behalf of the companies and both commissions. The defendants-respondents have also had a full

opportunity, of which they have availed themselves, to present redirect and rebuttal testimony on this phase of the case. In addition, briefs of all counsel have dealt quite exhaustively with the subject.

It is, of course, beyond the practical scope of this opinion to analyze all the exhibits and testimony dealing with this subject. There is abundant evidence disclosing that we are today at a point where rates of return demanded are among the lowest that have ever existed. The exhibits put into evidence by practically every witness show that today over-all returns and yields are lower than before. Ample evidence of record indicates that the companies would have no difficulty in financing at a low cost if they restricted their securities to a proper amount, with reasonable ratio of bonds, preferred and common stock. There is substantial evidence of record indicating that the companies could finance on as favorable a basis, if not a more favorable basis, than any natural gas producing and transmission company in the United States. There is testimony of record indicating in this connection that with earnings of 6.2 per cent to 6.5 per cent a sound pipeline company could easily finance on a basis of 40 per cent bonds, 20 per cent preferred stock, and 40 per cent common stock, with yield or return to the public of 3.5 on the bonds, 5.75 per cent on the preferred and 8 per cent on the common stock. The cost of money to such company would be 3.75 per cent for the bonds, 6.10 per cent for the preferred, and 10 per cent cost of floating the common stock. On such basis of financing, the interest coverage would be 4.68 times.

From the law we know that we are required to fix rates which will permit the companies to earn a fair return. From an examination of the law we can also determine the essential basic general elements that we must consider in determining what is a fair rate of return. However, the application of these principles to a concrete case such as the matter before us requires the application of our judgment to all the facts as we find them in the record.

Fundamental statements respecting the general principles applicable in ascertaining what is a fair rate of return may be found in *Bluefield Waterworks & Improvement Co.* v. *Public Service Commission of West Virginia*, 262 U. S. 679, where the Court stated, at page 692:

> "What annual rate will constitute just compensation depends upon many circumstances and must be deter-

mined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to
2863 earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally."

It is interesting to note that the defendants-respondents do not ask that we find a *fair rate of return* but assert "a minimum of eight per cent should be allowed defendants as a just and reasonable return on the value of their property." An expert for the Illinois Commerce Commission testified that a fair return for these companies "did not exceed six per cent." The brief of counsel to this Commission states that "the fair rate of return is six per cent,—and in no event should it exceed 6½ per cent."

Suffice it to say that we have carefully considered the testimony of record relating to the problem of fixing a fair rate of return, contentions of all parties interested in these proceedings, and in the light of the Bluefield case conclude, for the purpose of disposing of the motion before us, that 6½ per cent is a fair annual rate of return upon the rate base allowed.

Conclusion.

The following table shows the results of our conclusions stated above:

Income available for amortization and return		$9,362,032
Less amortization		1,557,852
Income available for return		$7,804,180
Rate base	$74,420,424	
Rate of return	6.5%	
	$ 4,837,328	$4,837,328
Available for reduction in net revenues		$2,966,852
Consequent reduction in Federal Income Taxes		783,909
Total Available for Rate Reduction		$3,750,761

The record herein, in view of the foregoing, impels us to the further conclusion that rates and charges presently charged by the defendant-respondent companies are unjust, unreasonable, unlawful, and violative of the provisions of the Natural Gas Act. Therefore, until further order of this Commission, and in keeping with the requirements of Section 5(a) of the Act, we presently determine for the purpose of disposing of the motion before us that the just and reasonable rates, charges, etc., to be hereafter observed by said companies and fixed by order of this Commission shall reflect an immediate reduction of at least $3,750,000. The Commission feels that a reduction of this amount is conservative in view of the acceptance of the companies' estimates and the generous allowances made throughout.

Before concluding, it is to be noted that the acceptance by us, for the purpose of disposing of the motion for 2864 an interim order (and for that purpose only), of reproduction cost testimony presented by the defendant-respondent companies will not inhibit us from subsequently exercising our judgment as to how reproduction cost evidence shall be ultimately treated herein.

An appropriate order embodying its findings of fact will be entered in accordance with this opinion.

Leland Olds,
Chairman.
Claude L. Draper,
Commissioner.
Basil Manly,
Commissioner.
John W. Scott,
Commissioner.
Clyde L. Seavey,
Commissioner.

Dated at Washington, D. C., this 23rd day of July, 1940.

Leon M. Fuquay,
Secretary.

Entered July 23, 1940.

2865 UNITED STATES OF AMERICA.

FEDERAL POWER COMMISSION.

Commissioners:

Leland Olds, Chairman; Claude L. Draper, Basil Manly, John W. Scott, Clyde L. Seavey.

July 23, 1940.

* * (Caption G-109 & G-112) * *

ORDER REDUCING RATES.

Having considered the complaint of the Illinois Commerce Commission against, the answer thereto by, and the order of this Commission instituting investigation of, the Natural Gas Pipeline Company of America and the Texoma Natural Gas Company, defendants-respondents herein, a motion of counsel for the Illinois Commerce Commission and counsel for this Commission for an immediate interim order reducing rates, the conditional answer and pleas to jurisdiction in reply thereto by defendants-respondents, the other orders previously entered herein, the evidence of record, the oral arguments presented before the Commission sitting en banc and the briefs filed herein, and having on this date made and entered its Memorandum Opinion

(Opinion No. 49) which is hereby referred to and made a part hereof by reference:

The Commission, for the purpose of disposing only of the joint motion before it for an immediate interim order reducing rates, in the above entitled matters, finds that:

(1) The Natural Gas Pipeline Company of America is a corporation organized and existing under the laws of Delaware; is engaged in the transportation of natural gas in interstate commerce by means of its 24-inch natural gas main transmission pipe line, approximating 900 miles in length, extending from a point in the State of Oklahoma known as Gray's Junction through the States of Kansas, Nebraska, and Iowa, and into the State of Illinois to a point near Joliet; is also engaged in the sale in interstate commerce of natural gas so transported to various purchasers for resale for ultimate public consumption for domestic, commercial, industrial, and other uses; and is a "natural-gas company" within the meaning of the Natural Gas Act;

(2) The major portion, approximating 90%, of the natural gas transported and sold by the Natural Gas Pipeline Company of America is sold to the Chicago District Pipeline Company, for resale for public consumption, delivery being made near Joliet, Illinois;

(3) The Texoma Natural Gas Company is a corporation organized and existing under the laws of Delaware; is engaged in the production and gathering of natural gas in the Texas Panhandle field; is engaged in the transportation of natural gas in interstate commerce by means of its 24-inch natural gas main transmission pipe line, approximating 75 miles in length, extending from its compressor station in the State of Texas near Fritch into the State of Oklahoma to its sales meter and connection, near Gray's Junction, with the system of the Natural Gas Pipeline Company of America; is also engaged in the sale in interstate commerce of gas so transported to the Natural Gas Pipeline Company of America for resale for ultimate public consumption for domestic, commercial, industrial, and other uses; and is a "natural-gas company" within the meaning of the Natural Gas Act;

(4) The major portion, approximating 90% of the natural gas so produced and gathered by the Texoma

Natural Gas Company, is transported and sold by it to the Natural Gas Pipeline Company of America at the aforesaid delivery point near Gray's Junction, Oklahoma;

(5) The Illinois Commerce Commission is a "State commission" within the meaning of the Natural Gas Act;

(6) The rates and charges, demanded, observed, charged, and collected by the Natural Gas Pipeline Company of America and the Texoma Natural Gas Company, defendants-respondents herein, for the transportation and the sales of natural gas in interstate commerce, set forth in findings Nos. (1) to (4), inclusive, together with the rules, regulations, practices, and contracts, affecting such rates and charges, are subject to the jurisdiction of this Commission;

2866 (7) The Natural Gas Pipeline Company of America and Texoma Natural Gas Company, defendants-respondents, are under substantially common control and ownership, are but arms of the same organization, being virtual departments of the same, and are in all substantial respects operated as a single enterprise, for the production, gathering, transportation, sale, and delivery of natural gas;

(8) Until further order of this Commission and for the purpose of disposing of the motion before us, a rate base composed of the Companies' estimates may be accepted, as follows:

Reproduction Cost New of Physical Properties (exclusive of gas reserves) as of June 1, 1939	$56,302,250
Value of Gas Reserves as of June 1, 1939	13,334,775
Capital Additions from June 1, 1939, to December 31, 1942	3,808,399
Working Capital	975,000
Rate Base	$74,420,424

(9) The total capital expenditures of the Companies through December 31, 1954, less salvage (including all capital expenditures to date), based upon the Companies' estimates, will be not more than $78,284,009, which is the amount on which provision for amortization should be calculated;

(10) The period over which the provision for amortization should be calculated is the entire life of the properties, estimated by the Companies to be 23 years, 1932-1954, inclusive;

(11) The annual allowance for amortization should be calculated on a sinking fund basis, with interest credited to the amortization reserve at the rate of 6½% per year, compounded annually;

(12) The required annual allowance for amortization is $1,557,852;

(13) The fair rate of return for the Companies is not more than 6½% per annum;

(14) The annual amount necessary for a fair return to the Companies is not more than $4,837,328, which, with the addition of the annual allowance of $1,557,852 for amortization in (12) above, amounts to a total of $6,395,180, for amortization and a fair return;

(15) The Companies' annual net revenues available for amortization and return, based upon the Companies' estimates, averaged for 1939 to 1942, inclusive, will be $9,511,454, which will be reduced to approximately $9,362,032 as a result of the calculated increase in Federal taxes under the 1940 Revenue Act;

(16) The Companies' annual net revenues (as found in (15) above) available for amortization and return, exceed the amount reasonably necessary as found in (14) above, by $2,966,852;

(17) A reduction in annual net revenues of $2,966,852, together with the consequent reduction in the applicable Federal Income Tax, would permit a reduction in rates (gross operating revenues) of $3,750,000;

(18) The rates and charges made, demanded, or received by defendants-respondents for or in connection with their transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption are unjust, unreasonable and excessive;

(19) The rates and charges of defendants-respondents, after reflecting the reductions hereinafter ordered, will be just and reasonable;

Therefore, the Commission orders that:

(A) The rates and charges made, demanded, or received by defendants-respondents for or in connec-

tion with their transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption shall be reduced to reflect a reduction of not less than $3,750,000 per annum in the operating revenues of Natural Gas Pipeline Company of America;

(B) Defendants-respondents shall file on or before August 15, 1940, new schedules of rates and charges for or in connection with their transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption, which shall reflect the reduction in operating revenues ordered in paragraph (A) above, which new schedules of rates and charges shall be effective as to all bills regularly rendered on or after September 1, 1940;

2867 (C) The Commission reserves the right to reject all or any part of such new schedules and in lieu thereof to prescribe the same by further order;

(D) On and after the effective date of the new schedules of rates and charges filed and made effective in accordance with paragraph (B) above, defendants-respondents shall cease and desist from making, demanding, or receiving any rates and charges which do not reflect the reduction ordered in paragraph (A) above;

(E) The record herein shall remain open for such further proceedings as the Commission may deem necessary or desirable;

(F) The motion by defendants-respondents to dismiss the motion for immediate interim order reducig rates for want of jurisdiction be and the same is denied;

(G) The motion by defendants-respondents to dismiss the motion for immediate interim order reducing rates for want of sufficient evidence of record be and the same is denied;

(H) This order shall not be construed as an acquiescence by this Commission in any estimates or determinations of original cost, or any valuation of property, claimed or asserted by said defendants-respondents.

By the Commission.

Leon M. Fuquay,
Secretary.

2869 August 8, 1940. Filed Aug. 8, 1940.

UNITED STATES OF AMERICA.

FEDERAL POWER COMMISSION.

(Caption—G-109 & G-112)

MOTION FOR A STAY OF THE COMMISSION'S ORDER OF JULY 23, 1940.

To the Honorable Federal Power Commission:

Now comes Natural Gas Pipeline Company of America and Texoma Natural Gas Company, defendants-respondents in the above entitled and numbered causes, and move the Commission to enter and issue an order staying and suspending the effective date and the operation of its order dated July 23, 1940, and served on defendants-respondents on August 1, 1940, ordering and directing defendants-respondents to file on or before August 15, 1940, new schedules of rates and charges for or in
2870 connection with their transportation and sale of natural gas in interstate commerce which shall reflect a reduction in operating revenues of Natural Gas Pipeline Company of America of not less than $3,750,000.00 per annum.

The grounds upon which this motion is based and presented follow.

I.

Defendants-respondents, in good faith and with diligence and expedition, are engaged in preparing a motion for rehearing on the issues decided adversely in the memorandum opinion of the Commission upon which said order dated July 23, 1940, is based, and in said order itself. Said motion for rehearing, in due course and within the time required under the Natural Gas Act, will be filed with the Commission and will be presented and urged in good faith before the Commission.

II.

Serious and substantial questions of law and of fact have been raised and presented by defendants-respondents

in the proceedings before the Examiner herein and in the pleadings and briefs filed and submitted in reply to the motion for interim order, in pursuance of which the Commission entered its said order dated July 23, 1940. Reference is here made to the transcript of the evidence in the above entitled and numbered causes and to the several exhibits offered and received in connection therewith; to the answer of defendants in said cause No. G-109 filed November 18, 1938; to defendants-respondents' pleas to the jurisdiction of the Commission dated December 18, 1939, in reply to said motion for an interim order; to the 2871 conditional answer of defendants-respondents dated December 18, 1939, in reply to said motion for interim order filed by complainant and counsel for the Commission; to defendants-respondents' memorandum brief dated December 18, 1939, in support of their pleas to the jurisdiction of the Commission to enter an interim order pursuant to motion of complainant, Illinois Commerce Commission, and counsel for the Commission; and to defendants-respondents' memorandum brief dated February 15, 1940, in reply to briefs of complainant and counsel for the Commission. Said transcript, exhibits, pleadings and briefs are all on file with and in the hands of the Commission, and same are by reference expressly made a part of this motion. An examination of said transcript, exhibits, pleadings and briefs to which we have just referred discloses affirmatively that serious and substantial questions of law and of fact have been and are in good faith presented on behalf of defendants-respondents to the Commission, many of which issues have been by the Commission resolved adversely to the position and contention of the defendants-respondents thereon. Defendants-respondents in their motion for rehearing, to be filed in due course as aforesaid, will point out and assign the various errors committed by the Commission in its adverse ruling on said several issues of law and of fact.

III.

In their motion for rehearing defendants-respondents will point out and assign as error on the part of the Commission its holdings, rulings and findings on the several issues resolved adversely to the defendants-respondents by the Commission in its said opinion and order, including the following:

2872 1. In holding that defendants-respondents' business is affected wiht a public interest and is subject to regulation under the Natural Gas Act;

2. In holding that it has authority under the Natural Gas Act to enter an interim order pending the final conclusion of the hearing now pending before the Commission and its Examiner;

3. In holding that defendants-respondents have had a full and fair hearing within the meaning of the Natural Gas Act and the Fifth Amendment to the Constitution of the United States;

4. In holding that the claim of defendants-respondents for $8,500,000.00 for going concern value as a part of the rate base is an arbitrary claim not supported by substantial evidence warranting its allowance, and in refusing to allow such going concern value, which defendants-respondents insist is established by uncontradicted evidence;

5. In reducing the allowance in the rate base for future capital expenditures, which under the uncontradicted evidence must be incurred, from $9,145,083.00 to $3,808,399.00;

6. In holding that the rate base claimed by defendants-respondents in the amount of $82,291,553.00 should be reduced to $74,420,424.00;

7. In holding that the amount to be amortized should be reduced from $84,341,218.00, as claimed by defendants-respondents, to $78,284,009.00;

8. In holding that the amount to be amortized should be the investment cost and not the fair value of the property at the present time;

2873 9. In holding that the period over which provision for amortization should be calculated is the entire maximum life of the properties, namely, 23 years, beginning January 1, 1932, and ending sometime prior to December 31, 1954;

10. In not holding that the period over which provision for amortization should be calculated is the period beginning with the present time and extending over the remaining life of the properties;

11. In holding that the annual allowance for amortization should be calculated on a sinking fund basis, with interest credited to the annual allowance for amortization reserve at the rate of 6½% per annum, compounded annually;

12. In not holding that interest on the annual allowance

should be calculated at not more than 2%, compounded semi-annually, which, as shown by the uncontradicted evidence, is the most that defendants-respondents could earn by investing the annual accruals for amortization in the highest types of income-bearing securities;

13. In holding that if a rate of return of 6½% is fair and equitable for defendants-respondents, the same rate would be fair and equitable in computing the amortization to be charged as an operating expense under the sinking fund formula;

14. In holding that the required annual allowance for amortization is only $1,557,852.00;

15. In not holding that the required annual allowance for amortization is at least $4,849,620.00;

16. In finding that a fair rate of return for de-
2874 fendants-respondents on the present fair value of their properties, erroneously fixed at the sum of $74,420,424.00, is not more than 6½% per annum;

17. In not finding that the fair rate of return is at least 8% per annum;

18. In holding in effect that defendants-respondents are entitled to no more than the actual cost of refinancing their properties, with no compensation for the enterprise, skill in design and construction, and extraordinary management through which defendants-respondents' properties have been operated at extraordinarily high pressures and stresses and an extraordinarily high load factor, which enterprise, skill in design and construction and extraordinary management account for a very substantial portion of defendants-respondents' revenues and earnings;

19. In finding and holding that the annual amount necessary for a fair return to defendants-respondents is not more than $4,837,328.00;

20. In holding that the defendants-respondents' present annual revenues available for amortization and return exceed the amount reasonably necessary by the sum of $2,966,852.00;

21. In finding that the rates and charges received by defendants-respondents from the sale of natural gas in interstate commerce for resale for ultimate public consumption are unjust, unreasonable and excessive;

22. In finding that the rates and charges of defendants-respondents after reflecting the reductions ordered will be just and reasonable;

23. In not holding that the burden of proof rests
2875 upon complainant and counsel for the Commission to establish that defendants-respondents' existing charges are unjust and unreasonable, and that they have not discharged such burden;

24. In not holding that when and if complainant and counsel for the Commission discharge their burden of showing that defendants-respondents' rates and charges are unjust and unreasonable, the burden was then upon complainant and counsel for the Commission to show what rates would be just and reasonable, and that they have not discharged such second burden;

25. In denying the pleas of defendants-respondents to dismiss the motion for immediate interim order reducing rates for want of sufficient evidence;

26. In making no allowance in the annual expense and cost of operations to cover replacements of capital assets during the future life of defendants-respondents' business;

27. In ordering that the rates and charges by defendants-respondents for natural gas sold in interstate commerce for resale for ultimate public consumption be reduced to reflect a reduction of not less than $3,750,000.00 per annum in the operating revenues of Natural Gas Pipeline Company of America;

28. In ordering that defendants-respondents file on or before August 15, 1940, new schedules of rates and charges for and in connection with their transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption which shall reflect a reduction in operating revenues of $3,750,000.00, which new sched-
2876 ules of rates and charges shall be effective as to all bills regularly rendered on and after September 1, 1940;

29. In ordering that on and after the effective date of the new schedule of rates and charges defendants-respondents shall cease and desist from making, demanding or receiving any rates and charges which do not reflect the reduction ordered as aforesaid.

By enumerating the above mentioned holdings, findings and orders of the Commission, defendants-respondents do not waive, but expressly reserve, the right to point out and assign as error other holdings, findings and orders of the Commission in the motion for rehearing which defendants-respondents will prepare and file in due course as aforesaid.

Defendants-respondents will not here undertake to present their arguments in support of their position and contention that the holdings, findings and orders above mentioned are erroneous. Their position has been made clear to the Commission in the transcript, exhibits, pleadings and briefs filed with the Commission and by reference made a part of this motion as aforesaid. The contentions and arguments of defendants-respondents on said several issues set forth in the transcript, in the exhibits, in the pleadings, and in the briefs above referred to are here adopted and by reference reiterated in all things as if repeated here.

IV.

Even if it be assumed that under the terms of the Natural Gas Act the Commission has authority to
2877 regulate and fix the charges of defendants-respondents for natural gas sold in interstate commerce under the circumstances reflected by the record herein, and if it be assumed that a full and fair hearing has been accorded defendants-respondents and that there is substantial evidence warranting a finding by the Commission that the existing rates charged by defendants-respondents for natural gas are unjust and unreasonable (all of which defendants-respondents deny), the Commission is without authority to reduce the existing rates, fixed by private contracts negotiated prior to the enactment of the Natural Gas Act, to a level which will not enable and permit defendants-respondents to recover, during the remaining life of defendants-respondents' business, the present fair value of defendants-respondents' property devoted to public use, together with a reasonable return thereon. Defendants-respondents do not concede that the rate base allowed by the Commission is proper, or that 6½% per annum on a proper rate base constitutes a fair and reasonable return to defendants-respondents, in the light of this record; but, if it be assumed that the rate base allowed is proper, and that 6½% per annum is a reasonable and fair rate of return, the Commission's order dated July 23, 1940, operates to confiscate and take defendants-respondents' property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, in that, under the operation of the order, defendants-respondents are precluded absolutely from ever

recovering, during the remaining life of their project, as found by the Commission for the purposes of this order, the present fair value of their property through the accumulation of adequate reserves for amortization,
2878 the accruals allowed by the Commission being entirely inadequate.

V.

Feeling themselves aggrieved and very substantially damaged by the operation of said order, defendants-respondents have the right, which they will exercise, of preparing and presenting to the Commission a motion for rehearing, to be filed within thirty days from the service on defendants-respondents of such order. After the filing of such motion for rehearing, the Commission has thirty days within which to consider such motion for rehearing and enter an order sustaining or denying it. Should the Commission deny such motion for rehearing and refuse to abrogate its order, defendants-respondents have the right, which they will exercise, to a review of such order by the Circuit Court of Appeals of the United States for the circuit wherein defendants-respondents have their principal place of business or by the United States Court of Appeals for the District of Columbia. In their petition for appeal defendants-respondents will seek a review of all the holdings, findings and orders of the Commission adverse to the contentions of defendants-respondents clearly set forth herein and in the transcript, exhibits, pleadings and briefs by reference made a part of this motion, and any other adverse holdings, findings and orders of the Commission not here specifically pointed out but which defendants-respondents shall present to the Commission in their motion for rehearing to be filed herein as aforesaid.

VI.

If the order dated July 23, 1940, be not stayed and
2879 its operation be not suspended pending the filing of defendants-respondents' motion for rehearing and the proceedings of the Commission on such motion and pending the review of the order by the courts, defendants-respondents will sustain serious, substantial and irreparable damages and losses in this:

1. The operation of the order will deprive defendants-

respondents of revenues aggregating $312,500.00 per month which defendants-respondents would otherwise receive if the present rates continue in force during such period pending the filing and disposition of the motion for rehearing and the review of the order on appeal. Should the order be abrogated by the Commission upon consideration of defendants-respondents' motion for rehearing or by the court upon its review in due course of such order, the revenues of which defendants-respondents will have been deprived up to the time of the abrogation of such order will have been forever lost to defendants. Neither the Commission nor the court could make provision for the recouping by or reimbursement to defendants-respondents of the very substantial losses which defendants-respondents will have sustained. No provision is contained in the Natural Gas Act authorizing the Commission or the court to order such recouping or reimbursement, and defendants-respondents would be without means of recovering or recouping such losses as a result of further rate proceedings or otherwise. Defendants-respondents, therefore, are without protection against the irrevocable loss of the amount represented by the reduced
2880 revenues, during the period pending consideration by the Commission of the motion for rehearing and the review of the order by the courts, except by declining to observe the order during such period, in which event they might be prosecuted under the severe penal provisions of Section 21 of the Natural Gas Act. Said Section 21 provides that any person who wilfully and knowingly does, or causes, or suffers to be done, any act, matter or thing in the Natural Gas Act prohibited or declared to be unlawful shall, upon conviction thereof, be punished by a fine of not more than $5,000.00 or imprisonment for not more than two years, or both. It also provides that any person who wilfully or knowingly violates any rule, regulation, restriction, condition or order imposed by the Commission under authority of the Act shall, in addition to other penalties, be punished, upon conviction, by a fine of not exceeding $500.00 for each and every day during which such offense occurs. Without admitting that they would be subject to such severe penalties under the circumstances confronting them, defendants-respondents respectfully urge that they should not be put to the alternative of accepting the reduction of their revenues in a

very substantial amount each month as above pointed out, with no hope of recovery of their losses should the order be abrogated as the result of their motion for rehearing or their petition to the courts for review, or of defying the order of the Commission and thus taking the risk of becoming subject to the severe penalties in fines and imprisonment under the penal provisions above mentioned should the order ultimately be upheld.

2881 2. No express provision is contained in the Natural Gas Act for relief by appeal to any court for a stay of the operation of the order until after the denial of the motion for rehearing and the filing of a petition for review under Subdivision (b) of Section 19 of the Act. If the Natural Gas Act be construed as denying defendants-respondents the right to a review by a court of competent jurisdiction of the refusal of the Commission to stay the operation of its order dated July 23, 1940, and if the Natural Gas Act be construed as purporting to authorize the Commission to enforce said order pending the filing and disposition of the motion for rehearing, then the Natural Gas Act itself is null and void in so far as it purports to authorize the enforcement of the order during such period in that it would operate to deprive defendants-respondents of the right to a judicial review and to judicial relief against the injuries and damages they would sustain by reason of the operation of the order during the period pending the final disposition by the Commission of the motion for rehearing, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States. Likewise, the order itself, for the same reasons, would be null and void in so far as it would operate to reduce the revenues of defendants-respondents during the period pending the filing and disposition of the motion for rehearing; and any effort by the Commission to enforce the provisions of the order requiring defendants-respondents to reduce their rates and charges during such period would result in an unconstitutional administration of the Natural Gas

2882 Act, in violation of the due process clause of the Fifth Amendment to the Constitution.

3. No such emergency exists as would justify subjecting defendants-respondents to the peril of losing their revenues in the substantial amounts above stated or of taking the risk of subjecting themselves to the severe

punishment and penalties under the provisions of Section 21 of the Natural Gas Act. In this connection defendants-respondents point out that in the complaint of the Illinois Commerce Commission filed herein and in the opinion of the Commission it was observed that the rates and charges of defendants-respondents have a substantial effect on the cost of gas to ultimate consumers who purchase gas from those to whom defendants sell gas at wholesale for resale; and it is manifest that the ultimate objective of the Commission and the underlying objective of the Congress in the enactment of the Natural Gas Act was and is to secure for the ultimate consumers fair and reasonable rates for natural gas. However, even if the order of the Commission ultimately be upheld, defendants-respondents point out to the Commission that no advantage can possibly accrue to such ultimate consumers by reason of enforcing the rates and charges set up by the order of the Commission dated July 23, 1940, during the period pending the disposition of defendants-respondents' motion for rehearing by the Commission and the review of the order by the courts. Until the motion be finally disposed of and, if the motion for rehearing be not granted, until the termination of the proceedings on appeal to the courts for a review of the Commission's order, no state commission or
2883 other regulatory body would be warranted in reducing rates to the ultimate consumers because of the reduced charges ordered by the Commission until it be finally determined that such reduced prices and charges are valid and enforcible. The practical effect, therefore, of the order and the reduction in defendants-respondents' revenues resulting from the operation of the order, pending the disposition of the motion for rehearing and the review by the court, would be to deprive defendants-respondents of the amount represented by the reduction in their prices and charges and transferring said sums, not to the ultimate consumers, but to the purchasers at wholesale from defendants-respondents under contracts approved and executed by such purchasers, none of whom is complaining of defendants-respondents' rates and charges.

4. No public interest will be served by requiring defendants-respondents to pay over sums aggregating $312,500.00 a month during the period pending the disposition of the motion for rehearing by the Commission and the review of the order by the courts to the distributing com-

panies which purchase defendants-respondents' gas at wholesale and which are not here complaining that defendants-respondents' rates and charges are unjust and unreasonable.

Wherefore, defendants-respondents pray that the operation of the order dated July 23, 1940, be stayed and suspended pending the filing by defendants-respondents of their motion for rehearing and the disposition of such motion by the Commission and, in the event the motion for rehearing be denied, pending the review of said
2884 order by the courts on appeal.

J. J. Hedrick
20 North Wacker Drive, Chicago, Ill.
George I. Haight
209 South LaSalle St., Chicago, Ill.
S. A. L. Morgan
20 North Wacker Drive, Chicago, Ill.
Attorneys for Defendants-respondents.

Haight, Goldstein & Hobbs
209 South LaSalle St.,
Chicago, Ill.
Morgan, Culton, Morgan & Britain
Amarillo, Texas
Of Counsel.

State of Illinois }
County of Cook } ss.

Floyd C. Brown, being duly sworn, makes the following statement on oath: that he is the Vice President and General Manager of Natural Gas Pipeline Company of America and Texoma Natural Gas Company, defendants-respondents named in the above and foregoing motion; that he has read said motion and that the statements of fact therein contained are true.

Floyd C. Brown

Subscribed and sworn to before me this 7th day of August, 1940.

Esther M. Wilson,
(Seal) *Notary Public,*
Cook County, Illinois.

My commission expires May 27, 1943.

Filed Aug. 9, 1940. 2885

UNITED STATES OF AMERICA.

FEDERAL POWER COMMISSION.

(Caption—G-109 and G-112)

OBJECTIONS OF ILLINOIS COMMERCE COMMISSION TO GRANTING OF RESPONDENTS' MOTION FOR STAY OF COMMISSION'S ORDER OF JULY 23, 1940.

To the Honorable Federal Power Commission:

Now comes the Illinois Commerce Commission by its Attorney, John E. Cassidy, Attorney General of the State of Illinois, complainant in the above entitled cause, Docket Number G-109, and moves the Commission to deny the application of respondents for an order staying and suspending the effective date and operation of its order dated July 23, 1940.

2886

I.

Defendant-respondents are afforded ample opportunity to file their petition for rehearing before the effective date of the order on September 1, 1940.

II.

Defendant-respondents admit that their grounds for contending that the Commission's order of July 23, 1940 is invalid are already set forth in their briefs, pleadings, arguments and evidence filed with the Commission.

III.

Defendant-respondents' allegation that they will assign as error Points 1 to 30 contained on pages 4 to 8 inclusive of said motion afford no ground for the granting of a stay order since this paragraph in effect constitutes a petition for rehearing. Furthermore respondent states on page 8 that its position has already been made clear to the Commission in its affidavit, pleadings and briefs. As the Commission has rejected these contentions after a careful and deliberate consideration of these issues, no basis for granting respondents' motion for a stay has been made out.

IV.

Defendant-respondents' allegations that the Commission is without authority to reduce existing rates; that they do not concede that the rate base is proper; that 6½% does not constitute a fair and reasonable return; that defendant-respondents will be precluded from recovering the
2887 fair value of the property; that the order of July 23rd operates to confiscate and take respondents' property without due process of law; do not constitute any reason for granting a stay order as the Commission's order on its face demonstrates that respondents are assured of an adequate and fair return on a rate base in excess of their investment.

V.

Defendant-respondents' allegation that it proposes to seek a review of the Commission's order of July 23, 1940 in the Circuit Court of Appeals does not constitute ground for a stay order as it may apply to such court for a stay of the order of the Commission.

VI.

The allegation that the order will deprive respondents of $312,500.00 per month of revenues is not ground for granting of the stay order in view of the fact that the record shows that the respondents have been charging excessive and illegal rates in excess of those amounts for the past several years.

The order of the Commission sets forth in finding 15 that for the period of 1939 to 1942, the net revenues of the company available for amortization and return will average $9,362,032 annually; in finding 14, that the amount necessary for fair return and amortization is $6,395,180.00, such fair return being computed on the company's reproduction cost appraisal; in finding 16 that said net revenue will
2888 permit a reduction in net revenues of $2,966,852 or gross revenue of $3,750,000. If the Commission had used the Company's own investment as the rate base, or 6% as a fair return, the excessive return would have been found by the Commission to have aggregated much more than $3,750,000.00. The Commission itself has found that its order is conservative in view of the acceptance of the Company's estimates and the generous allowances made by the Commission throughout the order.

Wherefore, we pray that the application for a stay order be denied.

Illinois Commerce Commission,
By John E. Cassidy,
Attorney General.

Harry R. Booth,
Assistant of Counsel.

Entered Aug. 8, 1940.

2889 UNITED STATES OF AMERICA.

FEDERAL POWER COMMISSION.

Commissioners:

Leland Olds, Chairman; Claude L. Draper, Basil Manly.

John W. Scott and Clyde L. Seavey, not participating.

August 8, 1940.

• • (Caption—G-109 and G-112) • •

ORDER GRANTING IN PART AND DENYING IN PART A MOTION FOR A STAY OF THE COMMISSION'S ORDER OF JULY 23, 1940.

Upon application filed with the Commission on August 8, 1940, by Natural Gas Pipeline Company of America and Texoma Natural Gas Company, praying that the operation of the Commission's order dated July 23, 1940, in the above entitled matter, be stayed and suspended pending the filing of a motion for rehearing and the disposition of such motion and, in the event such motion be denied, pending the review of said order by the courts on appeal;

The Commission orders that:

(A) Paragraph (B) of the Commission's order adopted July 23, 1940, in this proceeding be and it is hereby amended to extend the time of filing of new schedules of rates and charges to on or before September 1, 1940;

(B) The application of Natural Gas Pipeline Company of America and Texoma Natural Gas Company, referred to above, be and it is hereby denied except as provided in paragraph (A) above.

By the Commission.

J. H. Gutride,
Acting Secretary.

2891 August 16, 1940. Filed Aug. 16, 1940.

UNITED STATES OF AMERICA.

FEDERAL POWER COMMISSION.

(Caption—G-109 & G-112)

APPLICATION FOR REHEARING.

To the Honorable Federal Power Commission:

Now come Natural Gas Pipeline Company of America and Texoma Natural Gas Company, defendants-respondents in the above entitled and numbered causes, hereinafter referred to as applicants, and apply for a rehearing on the order of the Commission dated July 23, 1940, and served on applicants on August 1, 1940, and for an order vacating and abrogating said order. The grounds upon which this application is based are stated specifically in the assignments of error, hereinafter set out,
2892 directed to certain rulings, holdings and findings in the proceedings leading up to the order, in the memorandum opinion on which the order is based, and in the order itself. Applicants insist that each of such assignments presents material error; and that the order based on such erroneous holdings, rulings and findings operates to deprive applicants of valuable and substantial rights and property, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States, and of the Natural Gas Act, with the inevitable result that applicants will sustain damages aggregating many millions of dollars.

In their pleadings, their statements to the Examiner in the course of the hearing of evidence, their oral argument before the Commission, and their briefs heretofore filed with the Commission, applicants have fully presented to the Commission their positions and contentions on the issues raised by the assignments of error. The statement of applicants' counsel to the Examiner, Record pp. 30-43, the answer of defendants in cause No. G-109 filed November 18, 1938, defendants' pleas to the jurisdiction of the Commission dated December 18, 1939, defendants' conditional answer to the motion for interim order filed December 18, 1939, defendants' memorandum brief dated Decem-

ber 18, 1939, and defendants' reply brief dated February 15, 1940, all on file with the Commission, are by reference made a part of this application for rehearing. In the interest of brevity applicants will not repeat the arguments submitted orally and in their briefs or undertake to cite and discuss here the authorities sustaining the positions, contentions and arguments of applicants on the issues
2893 presented by the assignments of error, except in a few instances where applicants feel that some elaboration may assist in pointing out the effect of the error assigned. We wish to make it clear, however, that we are receding from our position on none of the issues presented by the assignments of error, but in support of the position of applicants on the issues raised by the assignments adopt and urge the arguments applicable to such issues heretofore presented by counsel for applicants in their oral arguments and in their briefs.

Assignments of Error.

First.

The Commission erred in holding that it has authority under the Natural Gas Act to change, modify or set aside the charges and prices at which applicants are selling natural gas in interstate commerce at wholesale, it appearing from the record without contradiction that applicants, constituting a single enterprise, are engaged in the business of owning natural gas reserves in the State of Texas, developing such reserves through the drilling and equipping of wells thereon, producing natural gas therefrom in quantities equal to three-fourths of their total market requirements, purchasing gas from others in quantities equal to one-fourth of their market requirements, transporting the gas so produced and purchased through their own pipelines and facilities to points in the States of Kansas, Nebraska, Iowa and Illinois, and selling such commodity at wholesale to selected distributors and industrial consumers under private contracts; that their business is of a strictly private character, not affected with a public interest in the sense that Congress would have jurisdiction, power or authority to enact legislation purporting to authorize the Commission to regulate the charges or prices for which such commodity is sold; and that the necessary operation of any order purporting to reduce, change or

modify such charges would deprive applicants of their property and liberty of contract without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. (Commission's memorandum opinion No. 49, p. 9; Commission's order reducing rates, finding No. 6, p. 3.).

2894 The point urged in the above assignment of error was raised in Paragraph 7 of defendants' answer in cause No. G-109 filed November 18, 1938, and again in Section I of defendants' pleas to the jurisdiction of the Commission dated December 18, 1939. However, the point was not discussed in the oral argument before the Commission or in the briefs filed with the Commission since it is directed at the Natural Gas Act itself in so far as said Act by its terms may be held to be an attempt to confer on the Commission authority to reduce the prices charged by applicants for natural gas sold at wholesale under private contracts. The Commission has no power or jurisdiction to decide an issue going to the constitutionality of an act of Congress, although it has undertaken to do so in its opinion and order to which this application is directed. The point was saved by applicants in their pleadings and in their briefs, to be presented, if necessary, to the courts, which have the exclusive jurisdiction to decide the issue raised.

Second.

The Commission erred in overruling defendants' second plea to the jurisdiction of the Commission dated December 18, 1939, and in holding that it has jurisdiction under the Natural Gas Act to reduce the prices at which applicants are selling natural gas, by interim order or otherwise, pending the final termination of the proceedings and hearing now pending before the Commission and its Examiner, and pending a finding by the Commission, after the conclusion of the hearing and after applicants have had an opportunity to be heard on their briefs and arguments on the facts presented by the whole record and the law applicable thereto, that the rates and prices charged and collected by applicants are unjust, unreasonable, unduly discriminatory or preferential. (Commission's memorandum opinion No. 49, pp. 10-13.)

2895 It will be noted that there is no formal finding among those contained in the order reducing rates going to the issue raised by this assignment. However, the

Commission, in its memorandum opinion, pp. 10-13, held contrary to the position urged by applicants in the assignment of error. Applicants raised the issue in Section II of defendants' pleas to the jurisdiction of the Commission dated December 18, 1939, and urged the point in their memorandum brief dated December 18, 1939, pp. 4-27, and in their reply brief dated February 15, 1940, pp. 32-43. The position of applicants in such pleas and in their briefs in substance was and now is that the rates and charges of applicants are prima facie valid and that the Commission is without jurisdiction to reduce such rates and charges until the hearing now pending before its Examiner shall have been finally completed and closed and until applicants have had an opportunity to be heard in their briefs and arguments on the facts presented by the whole record and the law applicable thereto and until the Commission shall then find that the rates and prices charged and collected by applicants are unjust and unreasonable.

We have pointed out that the motion for interim order was filed in the midst of the hearing then in progress before the Examiner. We point out now that we are still in the midst of that hearing. Thirty witnesses who testified for applicants have not been cross examined. The complainant and counsel for the Commission have offered no evidence except that going to the question of rate of return. Applicants have had an opportunity to cross examine the four witnesses who testified on behalf of complainant and the Commission on rate of return. Complainant and
2896 counsel for the Commission have stated that they will cross examine the other witnesses who testified for applicants and that they will present witnesses who will testify to facts going to the issues raised by the testimony submitted by applicants. Before applicants can be held to have had a hearing within the meaning of the Natural Gas Act the cross examination of applicants' witnesses must have been concluded; applicants must have been given an opportunity to offer redirect testimony by these same witnesses after they have been cross examined; applicants must have heard the testimony of those who will testify adversely and they must be given an opportunity to cross examine those witnesses; and applicants must be given an opportunity to offer rebuttal testimony in reply to the testimony of witnesses whom the complainant and counsel for the Commission will present at the hearing.

There is no contention by complainant or counsel for

the Commission that the pending hearing has reached that stage where it can be closed. They have urged as a reason for an interim order the circumstance that many months will be required to complete the hearing. It is significant that the Commission in its memorandum opinion, page 11, states, "the companies have had a full opportunity, which they have exercised, to cross-examine all witnesses offered so far by counsel to either commission and to offer all rebuttal testimony in explanation and clarification which they desired with respect to the testimony of such witnesses." But a hearing within the meaning of the Natural Gas Act requires that applicants be given an opportunity to cross-examine all witnesses to be offered hereafter by coun-
2897 sel for either Commission and to rebut the testimony of such witnesses. Prospective delay in the orderly processes of justice is no justification for a denial of due process of law. Certainly the delay in this instance is not chargeable to applicants, who, an examination of this record will disclose, were required to present their testimony within a period much shorter than that ordinarily required for the presentation of such a volume of testimony of the character of that presented by this record. The complaint and investigation had been pending some fourteen or fifteen months when the last session of the hearing was concluded on January 10, 1940. Neither the complainant nor counsel for the Commission was ready to proceed with any testimony except that going to the question of a proper rate of return. Had counsel for the two Commissions been as diligent as were applicants in the preparation of their testimony, this hearing could have been completed and closed long prior to the expiration of the time required by the Commission to consider the application for interim order.

Third.

The Commission erred in holding that under the Natural Gas Act it has power and jurisdiction to enter an interim order pending the final termination of the hearing now pending and an opportunity by applicants to be heard by brief and oral argument on the law and the facts presented by the whole record, since no such power or jurisdiction is conferred upon the Commission by the Natural Gas Act, either in express terms or by necessary implication. (Commission's memorandum opinion No. 49, pp. 10-13.)

In Section III of defendants' pleas to the jurisdiction of the Commission dated December 18, 1939, applicants raised the point stated in the third assignment of error; and in Points II, III, IV, V and VI of defendants'
2898 memorandum brief dated December 18, 1939, pp. 28-82, and in defendants' reply to briefs and argument of complainant and counsel for the Commission dated February 15, 1940, pp. 32-43, applicants urged, and we think demonstrated, that there is no statutory authority empowering the Commission to enter an interim order pending the closing of the hearing now in progress, and in the absence of such statutory authority the Commission is without jurisdiction or power to enter such an order reducing applicants' rates. We demonstrated also that the jurisdiction and power to enter the interim order suggested in the motion cannot be read into the Act under the rule of contemporary construction; that the Commission has no power except that specifically conferred by the statute in express terms or by necessary implication; and that the words "after hearing" contained in the Natural Gas Act cannot be construed as authorizing the entering of any finding that prices and charges of applicants are unjust and unreasonable pending the final conclusion of the hearing now in progress.

Fourth.

The Commission erred in holding that in these proceedings applicants have had a hearing within the meaning of Section 5(a) of the Natural Gas Act, which provides that "whenever the Commission, after a hearing * * * shall find that any rate, charge, * * * is unjust, unreasonable, * * * the Commission shall determine the just and reasonable rate, charge, * * * and shall fix the same by order." (Commission's memorandum opinion No. 49, pp. 10-13.)

The issue presented by the fourth assignment is clearly raised in Sections II and III of defendants' pleas to the jurisdiction of the Commission dated December 18, 1939; Section I of defendants' conditional answer dated
2899 December 18, 1939; and it is presented and urged in Point VI of defendants' memorandum brief dated December 18, 1939, pp. 76-82, and in defendants' reply brief dated February 15, 1940, pp. 32-43. We remind the Commission that in their original brief counsel for complainant did not rely on the New England Divisions case

as authority for the interim order. On the other hand, they relied on cases arising in states in which there is special statutory provision for temporary orders with special provision for a recoupment of the difference in the temporary rate and the rate finally fixed should the rate finally fixed exceed the temporary rate. They also cited cases from the Oklahoma Supreme Court which, as we have already pointed out, are entirely out of line with the authorities in all other states. We demonstrated that the line of cases first cited in support of the motion for interim order are authority, not for the granting of the motion, but to the contrary. Counsel for the two Commissions then sought to fall back on the New England Divisions case and the Commission cites the latter case as authority for the order.

As we pointed out in our original memorandum brief (pp. 76-78) and in our reply brief (pp. 32-35), the New England Divisions case is not in point. If the hearing in the present case were now completed and if the oral arguments and briefs on the whole record, rather than half or less than half of it, had been presented, if the case had been submitted by all parties, and if the order were based on the whole record with a reservation that after further investigation in the light of the whole record the order might be changed or modified by the Commission, then the New England Divisions case would be in point; but
2900 there is nothing in the New England Divisions case warranting the conclusion that it is authority for the procedure here, where the motion for interim order was entertained and the order entered in the very midst of the hearing.

Fifth.

The Commission erred in denying the request of applicants that the issues of fact and of law raised by the motion on which the Commission's order of July 23, 1940, is based and by the briefs in support thereof be referred to the Examiner for a very careful analysis and consideration after receiving briefs and oral argument from counsel for the interested parties, and that the Commission have the formal recommendations of the Examiner on the issues, both of fact and of law, and the exceptions of applicants thereto, if any, before the Commission should consider the entering of an interim order reducing applicants' revenues.

Applicants have repeatedly urged the point that the issues of fact and of law presented by the record should be referred to the Examiner, who heard the witnesses testify and observed the demeanor of the witnesses while on the witness stand, who was present when the statistical and technical exhibits were identified and explained by the witnesses, and who followed the explanations of the exhibits, many of which consisted of charts, graphs and drawings of a highly technical character and tabulations of figures which were practically meaningless unless accompanied by explanations by those who prepared the figures.

Applicants further urged that the Examiner prepare a report, accompanied by his recommendations, going to the issues of fact and of law presented by the record, and that applicants be furnished with a copy of the report in order that they might file and present their exceptions thereto before the Commission should consider the entering of an order based on such report and recommendations.

2901 Perhaps the Commission did refer the record to its Examiner. We do not know. Perhaps the Examiner did make a report accompanied by recommendations to the Commission. We do not know. Perhaps the Commission acted upon such recommendations and entered its order in pursuance thereof. We do not know. Perhaps it rejected the report and recommendations in whole or in part and entered an order inconsistent with such report and recommendations as a whole. We do not know. But applicants are entitled to know the facts concerning the procedure between the Commission and the Examiner. The denial by the Commission of applicants' request that the usual open procedure be followed is reversible error, if not indeed a denial of due process of law. It seems perfectly clear that the Commission would not be in position to accept or reject the Examiner's report in whole or in part without itself, through the personnel of the Commission and not through representatives, reading every line of the testimony reflected by the transcript and exhibits submitted in connection therewith. Perhaps the members of the Commission have discharged their responsibility in this connection by reading and studying every line of the testimony and the exhibits submitted in connection therewith and, without inviting any suggestion by applicants or offering applicants any opportunity to be heard on the Examiner's report or recommendations, have accepted or re-

jected such report and recommendations in whole or in part and proceeded on their own responsibility to make their findings and holdings set forth in the Commission's memorandum opinion and order reducing rates. Even if they have pursued that course, applicants have been denied due process of law. The testimony should be heard
2902 by the trier of the facts. This is of special importance in a proceeding of this character where it is so difficult to follow the testimony from a mere reading of the transcript.

Had the Commission followed the usual procedure and directed the Examiner to make a report accompanied by recommendations and caused a copy of such report and recommendations to be delivered to applicants, the issues to be determined by the Commission could have been narrowed down to those on which applicants disagreed with the report and recommendations of the Examiner. On these issues, after hearing counsel on arguments supporting their exceptions, the Commission could have examined the record and passed upon such exceptions in an orderly way which would have constituted due process. Valuable rights are involved here, and we respectfully urge that the process through which the Commission has arrived at the drastic results reflected by its order should have been made known to applicants prior to the entering of the order and that applicants should have been given reasonable opportunity to be heard prior to the entering of the order.

The Commission observes on page 10 of its memorandum opinion that applicants have had full opportunity to present oral argument and file briefs and have in fact made unmistakably clear their position with respect to every single issue involved in these proceedings. The fact is, this record shows that applicants have never been heard in oral argument on the facts involved in this proceeding. They appeared at Washington on December 18, 1939, at the only hearing held before the Commission itself during the entire progress of these proceedings. Their
2903 counsel announced that they were not prepared to present an oral argument on any questions except those involved in the several pleas to the jurisdiction of the Commission to enter an interim order. The reasons stated for their finding themselves in that position show clearly that they did not have an opportunity to present oral argument on the facts or on the law going to any other questions than those raised by the pleas to the

jurisdiction. It is true they were permitted to file a brief and that they did file a brief on February 15, 1940, embracing some 404 pages, in which they undertook to discuss the issues of fact and of law presented by the record. However, they were not given as much time as they stated to the Commission they would require in order properly to brief the questions involved, and even if they had had all the time they requested they could not have presented in their brief, with that clarity with which they could have presented their views before the Examiner, who had heard the witnesses testify and had followed them in their tedious explanations of the numerous exhibits presented in connection with their testimony, the arguments going to the question of a proper rate of return, which question the Commission, with no substantial evidence to sustain its finding, erroneously has resolved against applicants.

In applicants' memorandum brief and in their reply brief they have cited numerous authorities supporting the contention here made. These authorities include *Ohio Bell Telephone Co.* v. *Public Service Commission,* 301 U. S. 292, 81 L. E. 1093; *Morgan* v. *U. S.,* 298 U. S. 468, 80 L. E. 1288; *Morgan* v. *U. S.,* 304 U. S. 1, 82 L. E. 1129; and *Wisconsin Telephone Co.* v. *Public Service Commission,* 287 N. W. 122.

2904 **Sixth.**

The Commission erred in not holding that the burden of proof rests upon complainant and counsel for the Commission to establish that applicants' existing charges are unjust and unreasonable, and that such burden has not been discharged.

Seventh.

The Commission erred in not holding that when and if complainant and counsel for the Commission discharged their burden of showing that applicants' rates and charges are unjust and unreasonable, the burden was then upon complainant and counsel for the Commission to show what rates and charges would be just and reasonable, and that such second burden has not been discharged.

The Commission in its memorandum opinion and its order ignored the issues raised in the sixth and seventh assignments of error. In the very beginning of these proceedings applicants urged that the burden of proof rests

upon the complainant and counsel for the Commission to establish that applicants' existing charges are unjust and unreasonable and that after they shall have discharged that burden, if they ever do, the burden will still rest upon them to show what rates and charges would be just and reasonable. That they have not discharged either of these burdens goes without saying, for they have made no attempt to discharge such burdens. We have presented this question in the oral statement of counsel shown at pages 30-42 of the transcript and in defendants' reply brief dated February 15, 1940, pp. 27, 43-96, and 378-391.

Eighth.

The Commission erred in finding that the rates and charges presently charged by applicants are unjust, 2905 unreasonable, unlawful and violative of the provisions of the Natural Gas Act. (Commission's memorandum opinion No. 49, p. 26; Commission's order reducing rates, finding No. 18, p. 4.)

Applicants have made their position on this point clear in their reply brief dated February 15, 1940, at pages 43-96, 378-391. We adopt the argument there presented. The succeeding assignments of error and the comments submitted in support of such assignments apply to and are adopted and urged in support of this assignment.

Ninth.

The Commission erred in establishing the following rate base:

Reproduction cost new of physical properties (exclusive of gas reserves as of June 1, 1939)	$56,302,250
Value of gas reserves as of June 1, 1939	13,334,775
Capital additions from June 1, 1939, to December 31, 1942	3,808,399
Working capital	975,000
Rate base	$74,420,424

(Commission's memorandum opinion No. 49, p. 19; Commission's order reducing rates, finding No. 8, p. 3.)

Tenth.

The Commission erred in not allowing as the proper rate base the items and amounts set out in defendants' reply brief dated February 15, 1940, p. 251, as follows:

2906 Reproduction cost new exclusive of gas reserves	$56,302,250
Less "viewed" depreciation	2,866,758
Present value of physical properties exclusive of gas reserves	$53,435,492
Present value of gas reserves	13,334,775
Allowance for future capital expenditures	6,046,286
Going concern value	8,500,000
Working capital	975,000
Rate base	$82,291,553

Eleventh.

The Commission erred in not holding that the proper rate base is the present value of the property, which, under the uncontradicted evidence, is made up of the reproduction cost new less viewed or actual depreciation of the depreciable properties, the value of the gas reserves, the going concern value, the working capital, and a proper allowance for future capital expenditures aggregating $82,291,553. (Defendants' reply brief dated February 15, 1940, p. 251.)

Twelfth.

The Commission erred in attempting to apply its own theory as to undepreciated rate base by placing on the gas reserves the present value of those reserves in their depleted condition. (Defendants' reply brief dated February 15, 1940, pp. 144-161.)

With reference to the ninth, tenth, eleventh and twelfth assignments of error we point out that applicants have never made the contention that the reproduction cost
2907 new of the physical properties other than leaseholds represents the present value of such properties. In conformity with the rule declared in *Smyth* v. *Ames*, 159

U. S. 466, 42 L. E. 819, and uniformly reaffirmed thereafter by the Supreme Court of the United States and other courts of last resort, we urge that the proper rate base is the present value of the property, including going concern value and working capital, now devoted to applicants' business, plus a proper allowance for future capital expenditures which the evidence shows without contradiction will be required during the remaining life of applicants' gas reserves in order to continue their business. No logic would justify fixing the present value of the depreciable properties other than leaseholds at the reproduction cost new thereof, with no deduction for depreciation that has already occurred in the properties of the existing plant, and then fixing on the gas reserves a valuation which in effect applies past depletion to the reproduction cost of such gas reserves. Yet that is exactly what the Commission has done in its findings and in its order. In weighing the reproduction cost new of the present properties, the Commission was required under the law to give effect to past depreciation and depletion of the present properties. The Commission seems to have become confused in the application of the rule that if the sinking fund formula be applied in computing the allowance for depreciation or amortization, an undepreciated rate base will be allowed. As we have demonstrated in defendants' reply brief dated February 15, 1940, pp. 172-181, that rule has nothing to do with the present depreciated and depleted condition of applicants' properties or with the deduction of past
2908 depreciation and depletion from reproduction cost new in arriving at present value. The rule has to do with future depreciation. Applicants' complaint is that the Commission has failed to allow the proper rate base in that it has failed to consider observed depreciation of the depreciable properties in the past and in that it has denied any allowance for going concern value or for capital expenditures after the year 1942, which, under the uncontradicted evidence, it must allow in arriving at the present fair value of applicants' properties.

The errors of the Commission in denying any allowance for going concern value and in denying any allowance for capital expenditures made after the end of the year 1942 will be specifically presented in succeeding assignments of error.

Thirteenth.

The Commission erred in making no allowance for going concern value in fixing the rate base and in fixing the amount to be amortized. (Commission's memorandum opinion No. 49, p. 19.)

Fourteenth.

The Commission erred in holding that the sum of $8,500,000 claimed by applicants as going concern value is an arbitrary claim not supported by substantial evidence, it appearing from the uncontradicted evidence that said sum of money represents the aggregate of expenditures actually made and costs actually sustained in developing the market outlets for applicants' gas up to the normal capacity of the lines; that such expenditures and costs were reasonable; and that at least that amount would have to be expended in attaching business if applicants were now at the beginning of their operations. (Commission's memorandum opinion No. 49, p. 19.)

2909 Notwithstanding the observations of the Commission in its memorandum opinion, we submit and again urge that applicants' claim for an allowance of $8,500,000 as going concern value is not an arbitrary claim, nor would its allowance mean the acceptance of a "deceptive fiction." It is supported by substantial evidence which is uncontradicted. The Commission says its allowance would result in an unfair imposition upon consumers. Our position is that its denial results in an unfair imposition on applicants in that it operates to confiscate this very substantial element of value which applicants have acquired as a part of the total value of their property at an actual cost greater than the amount claimed.

In their reply brief applicants have demonstrated that the courts for nearly a half century have held uniformly that going concern value must be considered and allowed in arriving at the present value of properties in fixing the rate base and in fixing the amount to be amortized. Only in those instances where the evidence fails to show the presence of going concern value have the courts upheld regulatory bodies which have denied an allowance for going concern value. It is true that the proving of going

concern value has been fraught with difficulties. The result is that it has become the practical rule that this element of value will be allowed only in the amount which the evidence shows definitely to be represented by actual costs to the regulated concern during the period of development. Every item claimed by applicants is amply supported by proof that the costs representing the item claimed were actually incurred. In every instance, 2910 except that dealing with actual depreciation during the first four years of applicants' operations, the evidence shows without contradiction that the money was actually paid out of pocket by applicants as interest on money invested in facilities provided in advance of load, in ad valorem taxes on such facilities during the period of load building, and in expenditures actually made in promotional activities in loading the line.

The claim for depreciation in connection with this item represents the actual depreciation on the facilities not yet in use during the load building period. The method of arriving at these values is not subject to question and the figures themselves are not subject to contradiction. An examination of the authorities submitted by applicants in their brief shows that the amount claimed is not out of line with amounts allowed for this item in many adjudicated cases. As already pointed out, the case of *Southwestern Bell Telephone Co.* v. *City of Fort Smith*, 294 Fed. 102, is direct authority sustaining this claim and the method of developing the evidence supporting it.

Fifteenth.

The Commission erred in reducing the amount allowed for future capital expenditures from $6,046,286, as claimed by applicants, to $3,808,399, thus eliminating from the amount allowed all future capital expenditures after December 1, 1942, it appearing from the uncontradicted evidence that the amounts claimed by applicants for capital expenditures after the date last mentioned will certainly and definitely be made and that the property acquired through such expenditures will be devoted to applicants' business. (Commission's memorandum opinion No. 49, pp. 17, 18 and 19; Commission's order reducing rates, finding No. 8, p. 3.)

2911 The Commission in its memorandum opinion observed that the improvements referred to in this assignment have not yet been made; that they are contemplated in the future; and it then asserted that such improvements are not used and useful in the present and to a certain extent must be deemed conjectural. As a matter of fact, the record shows without contradiction that substantial expenditures would have been made prior to the present time. It is true that the others are contemplated in the future. It is also true that those additional assets not yet acquired are not used and useful at the present; but we challenge the statement that these improvements even to a certain extent, to quote the Commission's language, are conjectural. The testimony is clear and unequivocal that these figures represent, not additional capital expenditures which may have to be made, but expenditures which must be made in order to carry on applicants' business through the year 1954. The testimony that applicants' gas wells are losing pressure from month to month and that with the decline in pressure there is even a more rapid decline in the productive capacity of the wells is uncontradicted. That testimony is not conjectural; it is in conformity with common knowledge concerning the behavior of gas wells. There is no conjecture in the uncontradicted testimony that additional wells will have to be drilled in large numbers to overcome the loss in productive capacity incident to the decline in pressures. There is no conjecture in the testimony that pipelines will have to be built to each of these new wells, and that meters and regulators will have to be installed at each of said wells. There is no conjecture in the uncontradicted
2912 testimony that as the pressures decline it will be necessary to install field compressor stations in order to deliver gas into the initial main line compressor station in such quantities as to keep applicants' pipeline loaded to its normal capacity. The drilling of new wells, the building of pipelines to these wells, the installing of meters and regulators at these wells, and the installing of field compressor stations to service all wells, drilled and to be drilled, constitute the major portion of the additional capital expenditures. Substantial portions of the remaining amounts claimed in this connection are directly related to the drilling, equipping and operation of new wells and the building and maintaining of the additional pipelines and

compressor station facilities. The other items are supported by positive testimony based on studies which the record shows were thorough to the last detail. The uncontradicted testimony further shows that the figures are conservative and that many additional capital outlays will be required to cover contingencies which the witnesses could not yet certainly foresee at the time they testified.

The Commission agrees that, in fixing rates for the future, reasonable estimates of property additions in the immediate future should be taken into consideration. Applicants' complaint is that in applying that principle, which was developed in connection with the regulation of continuing or perpetual utilities, the Commission failed to take into account the difference in the situation of applicants and such continuing or perpetual utilities. Applicants are engaged in an extractive industry. When their source of supply is exhausted they will of nec-
2913 essity go out of business. It is necessary, therefore, to look ahead and to make provision for additional capital costs to the end that applicants' rights be protected before it is too late to protect them. These expenditures are made from year to year—indeed, from month to month. It is utterly impractical to go back to the Commission each month or even each year and ask for additional allowances in the rate base to cover these capital expenditures which inevitably will have to be made. As observed by the Commission, applicants have not sought an allowance of the total of these capital expenditures in the rate base, but are asking an allowance of substantially less than the total under the principle of average investment over the period to be covered by the new rate. We have covered the subject thoroughly in defendants' reply brief dated February 15, 1940, pages 206-221.

Sixteenth.

The Commission erred in holding that the total investment, by which it manifestly means original cost, in contradistinction to claimed fair value, less the salvage value at the end of applicants' business, should be amortized. (Commission's memorandum opinion No. 49, pp. 20 and 21.)

Seventeenth.

The Commission erred in holding that the proper amount to be amortized is $78,284,009. (Commission's memorandum opinion No. 49, p. 21; Commission's order reducing rates, finding No. 9, p. 3.)

2914 Eighteenth.

The Commission erred in not holding that the proper amount to be amortized is $84,341,218, representing the present fair value of applicants' present properties, including going concern value and working capital, plus future expenditures for additional capital assets, less the liquidating salvage value at the end of the project's life. (Commission's memorandum opinion No. 49, pp. 20-22.)

Applicants have discussed the questions raised in the sixteenth, seventeenth and eighteenth assignments thoroughly in defendants' reply brief dated February 15, 1940, pages 97-226. There we presented squarely to the Commission the proposition that, whatever the rule may be as to ordinary public utilities or industries under regulation at the beginning of operations, an unregulated industry, upon being placed under regulation for the first time by the operation of a statute, is entitled to amortization of the full fair value of its properties subjected to public use as of the time it is overtaken with regulation, including cost in the future of additional facilities. The soundness of this proposition is not open to question, as we view it. The Commission made no comment on this question or on the authorities submitted in support of applicants' position in respect thereto. We urge upon the Commission, therefore, that it carefully reconsider its holding on this point and that it compare the situation of applicants with that of an owner whose property is condemned and actually acquired through the exercise of the right of eminent domain. It has been held universally that in condemning the property of a private owner for public uses the owner must be compensated in the amount of the fair value
2915 of the property condemned. It is true that the operation of the Natural Gas Act is not to take the title to applicants' properties; but it is manifest that the character of that title is radically and materially changed. Ap-

plicants no longer have a property devoted to their own private enterprise of producing, purchasing, transporting and selling natural gas at wholesale at prices on which they can agree with their purchasers; but, if the Natural Gas Act be upheld, they now have a property which, not they, but the Congress, has dedicated to a public use and which they must now own and operate under the regulation of the Federal Power Commission, delegated by Congress to carry out the provisions of the Act. It was not the original cost of applicant's properties in 1931, 1932, and subsequent years which Congress dedicated to a public use. On the other hand, it was the property which applicants owned and were utilizing in the operation of their business which Congress so dedicated. If it be assumed that Congress has the power to lay hold on property devoted to the character of business in which applicants are engaged and, without their consent, change the character and use of that property by impressing it with a public interest, then the Congress must provide for a reasonable return on the value of that property and for a return, over the future life of applicants' business, of the value, not the original cost, of such property at the time its character is changed.

Nineteenth.

The Commission erred in holding that the proper amortization period should be the total estimated life
2916 of the business, namely, 23 years from the beginning of 1932 to the end of 1954. (Commission's memorandum opinion No. 49, pp. 20-21; Commission's order reducing rates, finding No. 10, p. 3.)

Twentieth.

The Commission erred in not holding that the proper amortization period should be the period intervening from the present time to the end of the project's life, which, under the uncontradicted evidence, will be sometime prior to December 31, 1954. (Commission's memorandum opinion No. 49, p. 20.)

The issues presented by the nineteenth and twentieth assignments of error are of the utmost importance in that the drastic effect of the Commission's error in disposing

of these questions will inevitably result in the confiscation of many millions of dollars of the present value of applicants' properties affected by the Natural Gas Act. We have presented the question in defendants' reply brief, pages 226-237. It is our view that there is no escape from the position presented there.

When applicants' pipelines were constructed in 1930 and 1931 and when their operations commenced on January 1, 1932, they were not subject to regulation by any national or state commission or tribunal. Their business was a private enterprise, and it continued to be a private enterprise until the enactment and approval of the Natural Gas Act near the middle of 1938. Even if the Natural Gas Act be valid, they were not actually overtaken with regulation until August 1, 1940, the effective date of the Commission's order reducing rates. Prior to the date last mentioned the rates fixed between applicants and their purchasers at wholesale by private contracts con-
2917 tinued to be valid and binding on all parties. Their earnings prior to the issuance of the first order of regulation were their own, and the Commission is without authority to prescribe the application of their earnings prior to regulation. Yet, in thus directing that the period of amortization begin on January 1, 1932, the Commission is attempting to impose retroactive regulation upon applicants and applicants' business, not from the time its first order affecting applicants was issued, or indeed from the date the Act became effective, but for a long period prior to either of such dates. Not only did the Commission attempt to give retroactive effect to regulation in its treatment of the subject of amortization; but in that attempt the Commission failed to take into account the uncontradicted evidence showing that the total net revenues before amortization and return in each of the years 1932, 1933 and 1934 were less than the amount allowed in the order for amortization and return.

In ordering that the period of amortization should continue through the entire remaining life of the field the Commission ignored the fact, established by the uncontradicted evidence and accepted by the Commission as true, for the purposes of the interim order, that during the last two years of applicants' operations, 1953 and 1954, the total earnings available for amortization and return, without deducting the $3,750,000 as ordered by the Commis-

sion, will be substantially less than the entirely inadequate amount allowed by the Commission for amortization and return. Indeed, Exhibit 142, which the Commission has accepted for the purposes of this order, shows that
2918 after deducting this $3,750,000 annually from the net revenues available for amortization and return there will not be a single year from 1943 to 1954 inclusive when applicants will earn the amount allowed for amortization and return.

Twenty-First.

The Commission erred in holding that the annual allowance for amortization should be calculated on a sinking fund basis, with interest credited to the amortization reserve at the rate of 6½% per annum, compounded annually. (Commission's memorandum opinion No. 49, pp. 21-22; Commission's order reducing rates, finding No. 11, p. 3.)

Twenty-Second.

The Commission erred in not holding, under the uncontradicted evidence, that the annual allowance for amortization should be calculated on a straight line basis, or in any event on a sinking fund basis with interest credited to the amortization reserve at the rate of 2% per annum, compounded semi-annually. (Commission's memorandum opinion No. 49, pp. 21-22.)

Twenty-Third.

The Commission erred in holding that it is fair and equitable, in computing the amortization to be charged as an operating expense under the sinking fund formula, to use an interest rate of 6½%, the allowed rate of return. (Commission's memorandum opinion No. 49, pp. 21-22.)

Twenty-Fourth.

The Commission erred in not holding that in computing the annual reserve for amortization an interest rate of not more than 2% per annum, compounded semi-annually, should be used. (Commission's memorandum opinion No. 49, pp. 21-22.)

The questions raised by the twenty-first, twenty-
2919 second, twenty-third and twenty-fourth assignments of error were presented to the Commission by applicants in defendants' reply brief, pages 237-247. In holding that in computing the annual reserve to be allowed for amortization of the proper amount to be amortized an interest rate equal to the allowed rate of return should be used, the Commission has proceeded upon a new theory unsupported by authority of law. It has rejected the straight line method of computing the amortization reserve and has adopted an unsanctioned sinking fund method of computing the annual allowance for amortization. It has overlooked entirely the principle underlying the adoption of a sinking fund method of computing the annual allowance for amortization. The underlying reason for employing the sinking fund formula, through the operation of which less than the total amount to be amortized is paid back to the owners by the purchasers, is that an amount is returned each year which can be so managed and invested by the regulated company that at the end of the amortization period the amounts allowed from year to year together with the earnings on those amounts will aggregate the amount to be amortized. The Fifth Amendment to the Constitution requires that the full amount representing the value of applicants' properties be returned to applicants by the end of their operations. To deny them a return of all of the amount operates to confiscate their property, in violation of the due process clause. It is reasonable in computing the annual allowance for this purpose to charge the regulated company with interest on the amounts annually set aside at a rate which the owner of the funds can earn through its investment in outside securities of a character that will
2920 insure, as nearly as is possible, that both the principal and the interest will be available at the close of the owner's business. That underlying principle has been utterly overlooked, or, if not overlooked, ignored, by the Commission in its order at which this application is directed. It has fixed the compound interest rate to be used in computing the amortization reserves at 6½% per annum, the allowed rate of return.

The reason that it is proper to compute the return allowed on the value of applicants' property without depreciating the rate base over the period during which the

new rate will be effective is that, under any sinking fund method of computing the annual allowance for amortization, the full amount to be amortized is not paid by the purchasers; but only a portion thereof is paid. The sum of the annual installments is less than the total amount which must be returned. Applicants must look elsewhere than to their purchasers for a recovery of the difference between the sum of the amounts actually set aside from year to year and the total value of their properties. They cannot be required to put these annual installments to risk in the regulated business or a business of similar risks in order to procure a return to them of the full value of their property. They are entitled to put the reserve in the nearest to risk free investments obtainable. It is impossible to find investments which are risk free; as this record shows without contradiction. It is undisputed in the testimony that 2%, compounded semi-annually, is the highest return which applicants could be expected to earn through the sound investment of the annual allowances for amor-
2921 tization in the highest classes of securities available.

All the errors of which applicants complain are material in their effect upon the rights of applicants, and the effect of each of these errors is confiscation of applicants' property; but the Commission's errors in using the 6½% interest rate, compounded annually, rather than 2%, compounded semi-annually, in computing the allowance for amortization, like its errors in holding that the amortization period should begin in 1932 instead of the present time, are drastic in their results in that the effect of these errors will be to confiscate many millions of dollars of the amount representing the present value of applicants' properties. We shall have more to say on this point in our discussion of the succeeding assignments of error.

Twenty-Fifth.

The Commission erred in holding that as an annual reserve for amortization the sum of only $1,557,852 should be allowed. (Commission's memorandum opinion No. 49, pp. 22 and 26; Commission's order reducing rates, finding No. 12, p. 3, and finding No. 14, p. 4.)

Twenty-Sixth.

The Commission erred in not holding that the proper annual allowance for amortization is at least $5,100,732.

The errors of the Commission pointed out in the twenty-fifth and twenty-sixth assignments grow out of the Commission's errors pointed out in assignments sixteenth to twenty-fourth inclusive. The method by which the amount
claimed by applicants as a proper annual allowance
2922 for amortization is calculated is set out in defendants'
reply brief, pages 237-247.

We will now undertake to point out specifically the ultimate effect of the errors of the Commission in allowing only $1,557,852 annually as a reserve for amortization.

In the preceding assignments of error, out of which the last two assignments grew, we have pointed out that the proper amount to be amortized is $84,341,218; that the proper period of amortization is that beginning with the effective date of the order, namely, August 1, 1940, and ending with the life of applicants' gas reserves, which, under the uncontradicted evidence, will be exhausted sometime prior to the end of 1954. We have urged that the Commission should apply a safety factor and fix a shorter term for amortizing the value of applicants' property than the remaining life of the field; but, for the purpose of the figures we are about to submit, we will assume that applicants' business will continue through the year 1954, or a period of fourteen years, five months from the effective date of the order. We have pointed out that, if the sinking fund formula be employed in calculating the amortization reserve, the compound interest rate used must be not more than 2%. We have also pointed out that there is no authority for arbitrarily adopting the rate of return as the compound interest rate used in computing the annual allowance for amortization.

Since the proper amount to be amortized is $84,341,218, the holding of the Commission allowing as the amount to
be amortized only $78,284,009 results in the confisca-
2923 tion of $6,057,209 of the amount which must be re-
turned to applicants by the end of their project's life. Substantial as is the sum last mentioned, it seems small when compared with the amounts which would be confiscated as a result of the other errors of the Commission in calculating the allowances for amortization.

If $1,557,852 be set aside annually over fourteen years,

five months from and after August 1, 1940, the total amount set aside by the end of 1954 will be only $22,459,034. Interest on the several installments, compounded semi-annually at the rate of 2%, will accumulate interest in the amount of $3,282,480. The total allowance, including interest, therefore, will aggregate at the end of the amortization period $25,741,514. Thus it appears that of the $84,341,218 which must be returned to applicants there will be a deficit over the period of $58,599,704, which amount will be absolutely confiscated by the operation of the order. Placing these figures on an annual basis, the amount confiscated each year under the operation of the order is $4,064,710. Even if $78,284,009 were the proper amount to be amortized, as the Commission erroneously found, there would be a total deficit of $52,542,495, or an annual deficit of $3,644,558, which would be confiscated under the operation of the order.

If the proper amortization period were 23 years, as the Commission erroneously found, the setting aside of $1,557,852 annually would accumulate during the 23 year period only $35,830,596. The interest on the annual installments, compounded semi-annually at 2%, would accumulate an additional $9,157,915, or a total accumulation of principal and interest of $44,988,511. Thus it appears that, even if the Commission were right in fixing 23 years as the amortization period, the accumulation
2924 would fall short of the $84,341,218 to which applicants are entitled over the period by the sum of $39,352,707, or an annual deficit of $1,710,987, which would be confiscated through the operation of the order. If the Commission were right also in fixing the proper amount to be amortized at $78,284,009, there would still be a deficit of $33,295,498 over the whole period, or an annual deficit of $1,447,630, which would be confiscated under the operation of the order.

Now let us test the order by assuming, contrary to law and the uncontradicted record, that 6½%, the allowed rate of return, should be used as the compound interest rate in computing the annual allowance for amortization. During the fourteen years, five months remaining of the life of applicants' business after the effective date of the order the amount allowed would accumulate $22,459,034. Interest on the annual installments at the rate of 6½% per annum, compounded annually, during the period would accumulate an additional $13,018,702, or a total of $35,-

477,736 as principal and interest. Thus it appears that of the $84,341,218 which must be returned to applicants there will be a deficit over the period of $48,863,482, or an annual deficit of $3,389,367, which would be confiscated under the operation of the order. Applying these figures to $78,284,009, erroneously fixed by the Commission as the amount to be amortized, there would be a deficit of $42,806,263 over the whole period, or an annual deficit of $2,963,381, which would be confiscated.

Even if it be assumed that the Commission did not err in fixing the amount to be amortized, in fixing the
2925 period of amortization, or in fixing the compound interest rate to be used in computing the annual allowance for amortization, the amount allowed is inadequate and results in confiscation in that the sum of the 23 annual allotments of $1,557,852 added to the interest on each annual allotment at 6½%, compounded annually, amounts to only $78,044,638, or $239,361 less than the amount erroneously allowed by the Commission.

Twenty-Seventh.

The Commission erred in eliminating from the allowance for operating expenses the items representing replacements of capital assets subsequent to August 1, 1940, in an amount averaging $188,054 per annum. The estimated cost of these items is included in the $78,284,009 erroneously allowed by the Commission as the proper amount for amortization. However, in estimating applicants' average income available for amortization and return for the period from August 1, 1940, to and including December 31, 1942, the Commission disregarded the estimated cost of replacements during that period. Applicants point out that the Commission failed to include such costs among the operating expenses, thus under its own theory arriving at an amount $188,054 greater than the correct amount available for amortization and return under such theory.

Applicants' position on this question is presented in defendants' reply brief, pages 247-249. The error of the Commission in including the cost of replacements in the erroneous amount allowed for amortization does not offset its error in failing to allow the average cost of replacements as an operating expense. Applicants are entitled to recoup these replacements as operating costs just as they

are entitled to an allowance for the cost of items representing maintenance of the pipeline.

2926 Twenty-Eighth.

The Commission erred as a matter of law in finding that 6½% per annum on the rate base allowed is a fair rate of return for applicants, there being no substantial evidence to support the finding. The allowed rate of return purports to cover only the cost of capital, based on the testimony of an employee of the Commission whose conclusion on that point is not supported by his own factual premise. No allowance is made for efficiency and skill in design and engineering, through which applicants are able to operate their facilities under extraordinarily high stresses and to transport gas at extraordinarily high pressures, and efficiency in management in attaining and maintaining an average load factor more than 30% higher than that ordinarily attained by other pipelines, which efficiency and skill account for at least $1,200,000 of applicants' annual revenues, according to the uncontradicted testimony. (Commission's memorandum opinion No. 49, pp. 23-26; Commission's order reducing rates, finding No. 13, p. 3.)

Twenty-Ninth.

The Commission erred in not finding that the fair rate of return for applicants is not less than 8%.

The subject of a proper rate of return consumes a very substantial portion of the entire record, including numerous exhibits dealing with the cost of capital and other statistical subjects. In their reply brief, pages 278-391, applicants devoted more than 100 pages to a discussion of the evidence and the authorities going to this subject. We adopt and again urge all that we presented in the brief on this question. It is not practical, of course, for us to undertake here to go into an analysis of the testimony. Suffice it to say we still insist that there was no factual support in his own figures for the conclusions stated by the witness Smith that earnings of 6.2% to 6.5% would enable applicants to refinance even on the basis of 40% bonds, 20% preferred stock, and 40% common stock. The very
2927 figures set out on page 24 of the Commission's memorandum opinion show a cost of refinancing in excess of 6.5%. The Commission says, "The cost of money to such company would be 3.75 per cent for the bonds, 6.10

per cent for the preferred, and 10 per cent cost of floating the common stock." Had the Commission analyzed these figures it would have found that the total overall cost would amount to 6.72%, or 22/100 of 1% in excess of the earnings allowed. As demonstrated by Exhibit 209 and pointed out specifically in defendants' reply brief, pages 299-303, the exhibits submitted by the witness Smith, when supplemented by essential facts not shown in such exhibits, show that the cost of capital to natural gas pipeline companies would amount, on Smith's division of 40% to bonds, 20% to preferred stock, and 40% to common stock, to 7.71%; but all witnesses agreed that practically no preferred stock has been floated during the past several years by natural gas pipeline companies, for very good reasons reflected by the uncontradicted testimony. If the bonded indebtedness be increased to 50% and the common stock represent the other 50%, the same figures show that the overall cost would be in excess of 8%.

It is true that Smith testified that applicants could finance on as favorable a basis, if not a more favorable basis, than any natural gas producing and transmission company in the United States; but that conclusion by the witness is not sustained by the factual evidence brought in by the same witness through his exhibits. He admits that he knows substantially nothing about the particular risks confronting applicants, or, for that matter, the risks confronting the other pipeline companies with which he deals in his exhibits. His statement on that
2928 point is entitled to no more dignity than that of a mere guess.

As to the witness Kleinman, who is the only witness who testified that less than 8% would be a reasonable and proper rate of return, we have demonstrated in defendants' reply brief, pages 306-316, that the witness is utterly unqualified from a standpoint of experience, if not disqualified by reason of bias and prejudice. He admitted that his conclusion that 6% is a proper rate of return for applicants was based on his judgment that applicants were entitled to a lower rate of return than electric and gas distributing companies, on the theory that applicants are confronted with fewer risks than such distributing companies. He had already admitted that the Illinois Commerce Commission had recently allowed an electric utility a return of 6.3%. The abandon with which the witness approached his final conclusion, as pointed out on pages 313-314 of defendants' reply brief, should prompt the Commission utterly to disregard his testimony.

The Commission observes that there is abundant evidence disclosing that we are today at a point where rates of return demanded are among the lowest that have ever existed. We challenge that statement. The testimony is that the interest rates for short term loans of the very highest order and the yields on bonds of the very highest order are lower than at any time during the period covered by the exhibits. The evidence does not show that rates of return demanded are the lowest which ever existed. The testimony is exclusively to the effect that capital is staying out of industry and enterprise to an alarming degree,
due to the circumstance that its owners are not will-
2929 ing to invest it at the prevailing rates obtainable.

The Commission says that the exhibits put into evidence by practically every witness show that today overall returns are lower than before. Let that be granted; but these exhibits uniformly show that there is a wider margin between the yields on high grade bonds and the compensation demanded for risk than has ever obtained during the period covered by the exhibits. There is no showing that the overall returns and yields in the natural gas business over the past several years and at the time the exhibits were prepared were as low as 8%, not to speak of 6½%, the rate allowed by the Commission.

The Commission makes no pretense of allowing anything but cost of financing in the rate of return fixed, and, as already pointed out, it failed to allow the overall cost of refinancing as reflected by its own figures. No allowance whatever is made in the rate fixed for the circumstance that by reason of their enterprise, their engineering skill in designing and constructing the facilities employed, and the unusually efficient management of applicants in operating the line and marketing their products, applicants operate their facilities at the highest stresses and pressures ever attained by any pipeline company, with the result that they are able to transport, and do transport and market through their facilities, substantially higher volumes of gas than the quantities normally transported through pipelines of the same diameter by other companies. No allowance is made for the circumstance that by the exercise of extreme and sustained diligence, applicants have been able to build up and maintain an annual load factor of 92% of the maximum pipeline capacity, as
compared with 70% ordinarily attained by other pipe-
2930 line companies. No allowance is made for the circumstance that this skill, efficiency, diligence and man-

agement account for at least $1,200,000 annually of applicants' revenues.

It is inconceivable that the Commission would consciously attempt to cut the allowed return down to the point where it could barely escape the test of confiscation. The rate allowed does not meet that test; for it does not cover the actual cost of refinancing, much less any additional compensation for other elements which must be allowed applicants if the rate of return is to be fair and reasonable. In the light of the record, a finding that a rate of return of 6½% per annum is fair and reasonable presents a question of law, for there is no substantial evidence to support it. Only if the rate allowed were 8% or in excess of 8% could the finding of the Commission be upheld under the rule that its findings on the facts are conclusive. There is a difference of opinion among the witnesses qualified to testify on this point as to whether the rate of return should be 8% or some higher rate; but there is no evidence of probative force that would justify fixing the rate of return at less than 8%.

Thirtieth.

The Commission erred in holding that the annual amount necessary for a fair return to applicants is not more than $4,837,328 and that the proper allowance for amortization is $1,557,852, or a total of $6,395,180 for fair return and amortization. (Commission's memorandum opinion No. 49, p. 26; Commission's order reducing rates, finding No. 14, p. 4.)

Thirty-First.

The Commission erred in finding that applicants' 2931 annual net revenues available for amortization and return exceed the amount reasonably necessary by $2,966,852. (Commission's memorandum opinion No. 49, p. 26; Commission's order reducing rates, finding No. 16, p. 4.)

Thirty-Second.

The Commission erred in ordering that the rates and charges made, demanded or received by applicants in connection with their transportation and sale of natural gas

shall be reduced to reflect a reduction of not less than $3,750,000 per annum in the operating revenues of Natural Gas Pipeline Company of America. (Commission's memorandum opinion No. 49, p. 26; Commission's order reducing rates, paragraph (A), p. 4.)

Thirty-Third.

The Commission erred in finding that the rates and charges after reflecting the reductions ordered will be just and reasonable. (Commission's order reducing rates, finding No. 19, p. 4.)

The errors pointed out in the last four assignments naturally follow the errors pointed out in the preceding assignments, and the same observations presented above in connection with the preceding assignments and in the briefs and oral arguments are applicable to and are here adopted and urged in support of the last four assignments.

Thirty-Fourth.

The Commission erred in ordering that applicants file new schedules of rates and charges to reflect a reduction of not less than $3,750,000 per annum in the operating revenues of Natural Gas Pipeline Company of America effective as to all bills regularly rendered on or after September 1, 1940. (Commission's order reducing rates, paragraph (B), p. 4; Commission's order dated August 8, 1940, paragraph (A).)

Thirty-Fifth.

The Commission erred in ordering that from and after the effective date of the new schedules ordered to be filed applicants shall cease and desist from making, de-
2932 manding or receiving any rates and charges which do not reflect the reduction ordered in Paragraph (A) of the Commission's order reducing rates. (Commission's order reducing rates, Paragraph (D), p. 5.)

Thirty-Sixth.

The Commission erred in denying applicants' application for a stay of the Commission's order dated July 23, 1940, pending the filing of an application for rehearing and the

disposition of such application, and, in the event such application be denied, pending the review of said order by the courts on appeal. (Defendants-respondents' motion for stay filed August 8, 1940; Commission's order denying in part the motion for stay, dated August 8, 1940, Paragraph (B).)

The result of the Commission's order directing that the new rates prescribed in the order be effective immediately is an unconstitutional application of the Natural Gas Act. Under the express terms of the Natural Gas Act, applicants are not permitted to file a petition for judicial review of the Commission's order until after action upon an application to the Commission for a rehearing, or the lapse of thirty days after the filing of such application. Applicants are denied a free and untrammeled court review of said order, as guaranteed by the Constitution of the United States, and are put to the choice of submitting to said order and giving up substantial sums of money each month which they can never recoup, or defying the order and thus subjecting themselves to the risk of being prosecuted under the severe penal provisions of the Natural Gas Act, without opportunity for judicial review of the order during the period pending the filing of the application for rehearing and the disposition thereof by the Commission.

2933 Wherefore, applicants pray that they be granted a rehearing herein and that the Commission enter an order abrogating and setting aside its order reducing rates dated July 23, 1940.

J. J. Hedrick,
20 North Wacker Drive, Chicago, Ill.,
George I. Haight,
209 South LaSalle St., Chicago, Ill.,
S. A. L. Morgan,
S. A. L. Morgan,
20 North Wacker Drive, Chicago, Ill.,
Attorneys for Applicants.

Haight, Goldstein & Hobbs,
209 South LaSalle St.,
Chicago, Ill.,
Morgan, Culton, Morgan & Britain,
Amarillo, Texas,
Of Counsel.

2934 Docket No. G109-112.

State of Illinois,
County of Cook. }

S. A. L. Morgan, being duly sworn, on oath states that he is one of counsel for applicants, Natural Gas Pipeline Company of America and Texoma Natural Gas Company, in the above entitled causes; that the assignments of error contained in the foregoing application for rehearing are made in good faith, are relied upon, and are in his opinion well grounded; and that all statements of fact made in said application for rehearing are true.

S. A. L. Morgan.

Subscribed and sworn to before me this 22nd day of August, 1940.

Mary Barkyoumb,
(Seal) *Notary Public, Cook County, Illinois.*

My Commission Expires June 17, 1944.

2935 UNITED STATES OF AMERICA.

Entered Sept. 6, 1940.

FEDERAL POWER COMMISSION.

Commissioners: Leland Olds, Chairman, Basil Manly, John W. Scott and Clyde L. Seavey. Claude L. Draper not participating.

September 6, 1940.

(Caption—G-109 and G-112)

ORDER DENYING APPLICATION FOR REHEARING.

Upon consideration of the application of Natural Gas Pipeline Company of America and Texoma Natural Gas Company filed August 19, 1940, for rehearing with respect to the Commission's Order Reducing Rates of Natural Gas Pipeline Company of America entered on July 23, 1940, and the Commission's Opinion No. 49;

The Commission finds that:

No new facts have been presented or alleged in the application for rehearing which would justify a reversal or revision of the Commission's said Order and said Opinion

No. 49, entered July 23, 1940, and no principles of law are stated in the application for rehearing which were not fully considered by the Commission before it rendered said Order and said Opinion;

Now, therefore, the Commission orders that:

The application for rehearing be and it is hereby denied.

By the Commission.

Leon M. Fuquay,
Secretary.

2936 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, 1940.

Natural Gas Pipeline Company of America and Texoma Natural Gas Company,
Petitioners,
vs.
Federal Power Commission and Illinois Commerce Commission,
Respondents.
} No. 7454.

I, Leon M. Fuquay, Secretary of the Federal Power Commission and official custodian of the records of said Commission, do hereby certify that the attached are true copies of:

1. Complaint of Illinois Commerce Commission filed in Docket No. G-109 on September 23, 1938;
2. Order instituting investigation entered October 14, 1938, in Docket No. G-112;
3. Answer of Defendants' filed on November 16, 1938, in Docket No. G-109;
4. Order fixing date of hearing for May 8, 1939, and consolidating Docket Nos. G-109 and G-112 for purposes of hearing entered April 14, 1939;
5. Designation of Examiner Frank M. Durrance to preside at hearing set for May 8, 1939, filed April 18, 1939;
6. Transcript of hearings held May 8 and 9, 1939;
7. Designation of Examiner Ewing G. Simpson to preside at hearing to be resumed May 22, 1939, filed May 17, 1939;

2937 8. Transcript of hearings held May 22, 23, 24, 25, 26, 29, 30, 31; June 1, 2, 26, 27, 28, 29, 30; July 24, 25, 26, 27, 28, 29, 31; August 1, 2, 3 and 4, 1939;

9. Notice postponing hearing to August 28, 1939 filed August 16, 1939;

10. Transcript of hearings held August 28, 29, 30, 31; September 1, 5, 6, 7, 8; October 2, 3, 4, 5, 6, 23, 24, 25, 26, 27, 28, 30, 31; November 1, 2, 3, 4, 6 and 7, 1939;

11. Motion for an immediate order reducing rates filed November 7, 1939;

12. Order fixing date for hearing for December 11, 1939, on motion for interim rate order entered November 15, 1939;

13. Transcript of hearings held November 27, 28, 29, 30; December 1, 2, 4 and 5, 1939;

14. Order postponing date for hearing to December 18, 1939, on motion for interim rate order entered December 5, 1939;

15. Transcript of hearings held December 6, 7, 12, 13, 14, 1939;

16. Defendants' pleas to the jurisdiction of the Commission in reply to motion for an interim order reducing rates filed December 18, 1939;

17. Conditional answer of Defendants to the motion for immediate order reducing rates filed by Complainant and Counsel for the Federal Power Commission, filed December 18, 1939;

18. Transcript of oral argument heard by the Commission en banc on December 18, 1939;

19. Order fixing date for resumption of hearing on January 8, 1940, and vacating direction in regard to filing briefs entered December 19, 1939;

20. Transcript of hearings held January 8, 9, 10, 1940;

21. Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 46, 47, 48, 49,
2938 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180,

181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, and 211, introduced into evidence at the hearings held on the dates indicated in items 6, 8, 10, 13, 15, 18, and 20 shown above.

(Exhibit No. 108 is a sample of a 6"x 6" steel cutting from corroded pipe of the 24" line which was introduced in evidence at the hearing held August 1, 1939. This physical exhibit is not included under this certificate);

22. Contract between Natural Gas Pipeline Company of America and Texoma Natural Gas Company dated October 15, 1931, introduced in evidence by reference at hearing held May 8, 1939 (T. 88);

23. Contracts and agreements of Natural Gas Pipeline Company of America set forth in Exhibit No. 11 introduced in evidence by reference at the hearing held May 8, 1939 (T. 96);

24. Response to Order No. 51 filed by Natural Gas Pipeline Company of America and Texoma Natural Gas Company introduced in evidence by reference at the hearing held May 9, 1939 (T. 125);

25. Contract between Colorado Interstate Gas Company and Natural Gas Pipeline Company of America dated October 15, 1931, introduced in evidence by reference at the hearing held June 29, 1939 (T. 2151-2);

2939 26. Trial examiner's ruling re offer in evidence at hearing held January 10, 1940 (T. 10390-4), allowing exception to the ruling and allowing exception of Counsel for Illinois Commerce Commission and Federal Power Commission on ruling relative to Exhibit No. 212;

27. Opinion No. 49 and order reducing rates entered and filed July 23, 1940;

28. Motion for a stay of the Commission's order of July 23, 1940, filed August 8, 1940;

29. Order granting in part and denying in part a motion for a stay of the Commission's order of July 23, 1940, entered August 8, 1940;

30. Objections of Illinois Commerce Commission to granting of Respondents' motion for a stay of Commission's order of July 23, 1940, filed August 10, 1940;

31. Application for rehearing filed August 19, 1940;

32. Verification to application last above filed August 23, 1940;

33. Order denying application for rehearing entered September 6, 1940;

all of which constitute the record before the Federal Power Commission in the matter of *Illinois Commerce Commission, Complainant,* v. *Natural Gas Pipeline Company of America and Texoma Natural Gas Company, Defendants,* Docket No. G-109, and in the matter of *Natural Gas Pipeline Company of America and Texoma Natural Gas Company,* Docket No. G-112.

In witness whereof I have hereunto subscribed my name and caused the seal of the Federal Power Commission to be affixed this 24th day of October, 1940, at Washington, D. C.

Leon M. Fuquay,
Secretary.

(Seal)

2940 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Filed Sept. 11, 1940.

For the Seventh Circuit.

October Term, 1940.

Natural Gas Pipeline Company of America and Texoma Natural Gas Company,
Petitioners,
vs.
Federal Power Commission and Illinois Commerce Commission,
Respondents.
} No. 7454

PETITION FOR REVIEW OF INTERIM RATE ORDER OF FEDERAL POWER COMMISSION.

To Said Honorable Court:

Natural Gas Pipeline Company of America, a corporation, and Texoma Natural Gas Company, a corporation, hereinafter called petitioners, respectfully show:

I.

Each of petitioners is a private corporation organized and existing under and by virtue of the laws of the State of Delaware, and each is located and has its principal place

of business at 20 North Wacker Drive, in the City of Chicago, State of Illinois, within the Seventh Circuit.

II.

Respondent Federal Power Commission is a Government commission created by an act of Congress, having its principal office and place of business in the City of Washington, District of Columbia.

Respondent Illinois Commerce Commission is a state commission created by an act of the Legislature of Illinois, having its principal office and place of business at 2941 Springfield, Illinois, and also an office in Chicago, Illinois, both Springfield and Chicago being within the Seventh Circuit.

III.

Petitioners seek a review of a so-called interim order directing petitioners to file a new schedule of rates and charges to effect a reduction in their operating revenues in the amount of $3,750,000 a year, entered and issued by respondent Federal Power Commission on July 23, 1940, and amended by supplemental order dated August 8, 1940, under purported authority of the Natural Gas Act (15 U. S. C., Chapter 15B). The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)).

IV.

Since about January 1; 1932, petitioners have been, and they are at this time, engaged in the business of producing and purchasing natural gas and in transporting and selling at wholesale such natural gas in interstate commerce. Petitioner Texoma Natural Gas Company owns large reserves of gas in what is commonly known as the Panhandle gas field, in the State of Texas, which reserves underlie a great number of gas leases acquired, consolidated, developed and held by said petitioner. On its leases said petitioner has drilled many wells, from which it produces natural gas into a pipeline gathering system by it constructed, owned and operated, through which it transports such gas to its compressor station near the town of Fritch, in the State of Texas, and thence through its main pipe-

The interim order,[2] complained of, was entered by the Commission, July 23, 1940, accompanied by a detailed memorandum showing the basis for the order. There were also specific findings. It was made upon a motion by respondent, Illinois Commerce Commission, for an "immediate order." This motion was followed by petitioners' plea to the jurisdiction and an answer. The motion for the interim order was made before termination of a complete investigation, but after fifty-five days of hearing. The order was entered six months later.

---

domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale * * *.

SECTION 4. (a) All rates and charges * * * shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

SECTION 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State * * * commission, * * * shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural gas company * * * or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification * * * or contract to be thereafter observed and in force, and shall fix the same by order: Provided, however, That * * * the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

[2] The Commission * * * finds that:

"(1) The * * * Pipeline Co. * * * is engaged in the transportation of natural gas in interstate commerce by means of its 24-inch natural gas main transmission pipe line, approximating 900 miles in length, extending from * * * Okla. * * * through Kansas, Nebr., and Iowa, and into * * *, Ill. * * * near Joliet; is also engaged in the sale in interstate commerce of natural gas so transported to various purchasers for resale for ultimate public consumption for domestic, commercial, industrial * * * uses; and is a 'natural gas company' within the meaning of the Natural Gas Act;

"(2) * * * approximately 90% of the natural gas transported and sold by * * * Pipeline Co. * * * is sold to the Chicago Dist. Pipeline Co., for resale for public consumption, delivery being made near Joliet. * * *

"(3) The Texoma * * * Co. * * * is engaged in the production * * * of natural gas in the Texas Panhandle field; * * * in the transportation of natural gas * * * by means of its 24-inch * * * pipe line, * * * 75 miles in length * * * from its compressor station in * * * Texas * * * into * * * Okla. * * * to its sales meter and connection, near Gray's Junction, with the system of the * * * Pipeline Co. * * *; is also engaged in the sale * * * of gas * * * for resale for ultimate public consumption for domestic, commercial, industrial, * * * and is a 'natural-gas company' within * * * the Act;

"(4) * * * approximately 90% of the natural gas so produced * * * by the Texoma Co. * * * is * * * sold by it to the Pipeline Co. * * * at the aforesaid delivery point (in) * * * Okla.;

"(5) The Ill. Com. Com. is a 'State commission' within the * * * Act;

"(6) The rates * * * charged, * * * by Pipeline Co. * * * for * * * the sales of natural gas * * * are subject to the jurisdiction of this Commission;

"(7) The * * * defendants * * * are * * * operated as a single enterprise * * *;

"(8) Until further order of this Commission and for the purpose of disposing of the motion before us, a rate base composed of the Companies' estimates may be accepted, as follows:

"Reproduction Cost New of Physical Properties (exclusive of gas reserves) as of June 1, 1939	$56, 302, 250
"Value of Gas Reserves as of June 1, 1939	13, 334, 775
"Capital Additions from June 1, 1939, to December 31, 1942	3, 808, 399
"Working Capital	975, 000
Rate Base	74, 420, 424

"(9) The total capital expenditures of the Companies through December 31, 1954, less salvage (including all capital expenditures to date), based upon the Companies' estimates, will be not more than $78,284,009, which is the amount on which provision for amortization should be calculated;

"(10) The period over which the provision for amortization should be calculated is the entire life of the properties, estimated by the Companies to be 23 years, 1932–1954, inclusive;

"(11) * * * amortization should be calculated on a sinking fund basis, with interest * * * at the rate of 6½% per year, compounded annually;

Briefly stated, the Commission ordered the $3,750,000 reduction in revenues on the following fact that assumptions:

Investment for rate base purposes (this was made up of reproduction cost, value of gas reserves, capital additions, and working capital)	$74,420,424
A return of 6½% was allowed	6½
	4,837,328
Annual amortization was added. (The amount allowed for amortization covered a period of 23 years, from 1932 to 1954)	1,557,852
Total deductions	6,395,180
The adjusted average annual net income was	9,362,032
The above determined required amount was	6,395,180
Excess	2,966,852

The lessening of petitioners' income by this amount would result in an income tax saving. Hence the total reduction ordered was increased from $2,966,852 to $3,750,000.

A many sided attack on the order is made by the petitioners.

First, they challenge the Commission's jurisdiction to enter this order because:

(a) The only authority given by the Act is to enter a final order.

"(12) The required annual allowance for amortization is $1,557,852;
"(13) The fair rate of return for the Companies is not more than 6½% per annum;
"(14) The annual amount necessary for a fair return to the Companies is not more than $4,837,328, which, with * * * $1,557,852 for amortization, * * * amounts to a total of $6,395,180, for amortization and a fair return.
"(15) The Companies' annual net revenues * * * based upon the Companies' estimates, averaged for 1939 to 1942, inclusive, will be $9,511,454, which will be reduced to approximately $9,362,032 as a result of the calculated increase in Federal taxes under the 1940 Revenue Act;
"(16) The Companies' annual net revenues * * * exceed the amount reasonably necessary * * * by $2,966,852;
"(17) A reduction in annual net revenues of $2,966,852, together with the consequent reduction in the applicable Federal Income Tax, would permit a reduction in rates (gross operative revenues) of $3,750,000;
"(18) The rates and charges made * * * by defendants * * * are unjust, unreasonable, and excessive;
"(19) The rates and charges of defendants * * * after reflecting the reductions hereinafter ordered, will be just and reasonable:
"Therefore, the Commission orders that:
"(A) The rates and charges made * * * by defendants * * * shall be reduced to reflect a reduction of not less than $3,750,000 per annum in the operating revenues of * * * Pipeline Co. * * *
"(B) Defendants * * * shall file on or before August 15, 1940, new schedules of rates and charges * * * which shall reflect the reduction in operating revenues ordered in paragraph (A) above, which new schedules * * * shall be effective as to all bills regularly rendered on or after September 1, 1940;
"(C) The Commission reserves the right to reject all or any part of such new schedules and in lieu thereof to prescribe the same by further order;
* * * * * * *
"(E) The record herein shall remain open for such further proceedings as the Commission may deem necessary or desirable;
"(F) The motion by defendants * * * to dismiss the motion for immediate interim order reducing rates for want of jurisdiction * * * is denied;
"(G) The motion by defendants * * * to dismiss the motion for immediate interim order * * * for want of sufficient evidence of record be and the same is denied;
"(H) This order shall not be construed as an acquiescence by this Commission in any estimates or determinations of original cost, or any valuation of property, claimed or asserted by said defendants * * *."

(b) There is only authority to enter orders determining rates (Sec. 5) whereas here the order directed reduction of income and left the company to determine the rates, which burden is doubled because they have contracts with varying rates, and they are not instructed how to apportion the reduction.

(c) The constitutionality of the Act is attacked because the companies' business is a private business and this Act, contrary to the Fifth Amendment, makes it subject to regulation as a public utility, and they have not even an opportunity to withdraw from business.

(d) The companies are not the kind of companies meant to be covered by the Act.

(e) There has been a denial of due process because there has been no full hearing.

(f) Since the companies' existing rates are presumably reasonable, the Commission has the burden of showing the contrary, and it has not sustained its burden. It has merely provided for a return, barely nonconfiscatory, rather than reasonable, and ignored the fact that the profits arose from the operator's engineering skill and the fact that the profits accruing are but a reasonable reward for the risk involved.

(g) The Illinois Commerce Commission has no legislative authority to move for such an order, and the Federal Power Commission in moving for such order is acting as prosecutor and court.

Second, they challenge the interim order of the Commission on its accounting theories:

(a) The "base" taken by the Commission is wrong because it excluded the item of going concern value of $8,500,000; it permitted only $3,808,399, instead of $6,046,286, for future capital expenditures, and it refused to exclude from the base, $2,866,758, for "viewed" depreciation. So, the base taken by the Commission ($74,420,424) was $7,771,129 less than the base contended for by the companies—i. e., $82,291,553.

(b) The 6½% return used by the Commission was unreasonably insufficient, and unsupported by the evidence. Not less than an 8% return should have been allowed.

(c) The period taken for amortization was wrong, namely, it should have started from the effective date of the Act, and not from the beginning of the companies' business.

(d) The base used for amortization, i. e., $78,284,009, was too low; it should have been $84,341,218.

(e) The amortization reserve should have been figured on a straight line basis with the interest at the rate of 2% semiannually, instead of on the sinking fund basis with interest at 6½%,

compounded annually. The annual amortization allowance should have been $5,100,732, instead of $1,557,852.

I. Constitutionality of Act as applied to petitioners. The argument supporting this view runs like this: (a) Petitioners are not in fact, or law,[3] a public utility, and the legislative declaration that they are, is unconstitutional[4] and ineffective to make them such. They do not sell to the public. 98% of their product is sold to wholesale customers. The price they charge has small effect on the consumer's cost because the service company's fixed charges are the dominant factor in ultimate cost to the public. Their gas is but an element in the product the public purchases, which also contains artificial gas. The fact that gas is widely used by the public is not important, for, they argue, so are meat, groceries, and many other unregulated commodities.[5] (b) The Act changes an existing, wholly private industry into a public utility, burdened with many iron-bound mandates—all this without giving petitioners a right to withdraw from the harshness of such supervision, and is therefore a violation of the Fifth Amendment.[6] They cite the fact that the Act delegates to the Power Commission the power to choose their customers for them (Sec. 7) and prohibits their dropping a customer—unsatisfactory though he may be.

We conclude, without much doubt, that the Natural Gas Act is constitutional. It falls within the Commerce Clause of the Federal Constitution. The necessity for its enactment was legislatively declared in Sec. 1 (a) (above quoted), and "it may not be annulled unless palpably in excess of legislative power.[7] Condemnation on this last-named ground lacks factual support in the instant case.

We appreciate, and may concede, the force of petitioners' factual distinction of the Nebbia, the Sunshine, and Appalachian Cases. They all involved, it is true, critical, economic conditions which demanded legislative solution, and such critical condition and urgent necessity of immediate control are here absent. But, where a legislative determination is based upon a very extended administrative investigation, which concluded that an industry was

---

[3] Union Falls Power Co. v. City of Oconto Falls, 265 N. W. 722 (Wis.).

[4] Michigan Public Utilities Com. v. Duke, 266 U. S. 570; U. S. v. Ohio Oil Co., 234 U. S. 548; Producers Transp. Co. v. Rd. Commission, 251 U. S. 228.

[5] Tyson v. Banton, 273 U. S. 418; New State Ice Co. v. Liebmann, 285 U. S. 262; Williams v. Standard Oil Co., 278 U. S. 235; Wilff v. Ct. of Industrial Relations, 262 U. S. 522.

[6] Wolff v. Ct. of Industrial Relations, 262 U. S. 522.

[7] Nebbia v. N. Y., 291 U. S. 502; Sunshine Coal Co. v. Adkins, 310 U. S. 381; U. S. v. Appalachian Electric Pow. Co., decided Dec. 16, 1940.

Nebbia v. N. Y.:

"Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in Government. * * * These correlative rights, that of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and that of the state to regulate the use of property and the conduct of business, are always in collision. * * * But subject only to constitutional restraint the private right must yield to the public need. * * * The Fifth

affected with a public interest and that Federal regulation thereof was necessary and that said business or industry is producing and transporting natural gas to be sold to gas companies engaged in public utility businesses in cities and villages, there exists no basis for a successful attack on such determination.

The natural gas industry controls the source of a commodity of great public importance and widespread consumption, and therefore its regulation by Congress may well be required. At least, Congress, in its wisdom, may so conclude. Courts cannot, and should not, assume a greater wisdom than Congress, and find otherwise. The court's function, at most, would be limited to an inquiry as to the existence of facts which would support legislative determination.

II. Form of Order, i. e., ordering a reduction of income of a designated amount, and not determining precise rates to be charged. Petitioners challenge, and respondents do not discuss the challenge, that the Commission's authority is only to "determine the just and reasonable rate * * * and shall fix the same by order." (Sec. 5; Title 15 U. S. C. A. Sec. 717d.)

The order of the Commission found the existing rates unreasonable and excessive, and ordered that they be reduced to reflect a decrease of $3,750,000 in operating revenues. This order did not "determine" the rates. But it evidenced the conclusion that the existing rates were too high and should be lowered such an amount as would reflect a specific reduction in profits.

Amendment, in the field of federal activity, * * * do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process.

"The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling, may be conditioned. Regulations of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency.

"We may as well say at once that the dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice. It goes without saying that those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities. But if, as must be conceded, the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting maladjustments by legislation touching prices? We think there is no such principle. * * * This court concluded (In Munn v. Illinois, 94 U. S. 113) the circumstances justified the legislation as an exercise of the governmental right to control the business in the public interest; that is, as an exercise of the police power. * * * 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large' * * *. Thus understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power': * * * The statement that one has dedicated his property to a public use is, therefore, merely another way of saying that if one embarks in a business which public interest demands shall be regulated, he must know regulation will ensue. * * *.

"Many other decisions show that the private character of a business does not necessarily remove it from the realm of regulation of charges or prices * * *. * * * Private contract carriers who do not operate under a franchise, and have no monopoly of the carriage of the goods or passengers, may, since they use the highways to compete with railroads, be compelled to charge rates not lower than those of public carriers * * *.

"It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Four-

The resulting rate might vary, depending upon which class of purchasers should be favored. It failed to name the customer (the utility, the commercial, or the industrial purchasers) and the degree of reduction to be allocated inter se. The Commission determined the underlying factors determinative of a rate sufficient to produce a fair and reasonable profit. The order left the companies free to apportion the reduction among the customers.

This action, while irregular and unusual, we believe, in rate determining commissions, was in no way harmful or prejudicial to the companies. In fact, it was favorable to them. It lodges a discretion—or play—in them whereby they might adjust the rates in the various classifications as may to them seem meet. Doubtless they will have some difficulty convincing their customers of the fairness of the reduction. But the difficulty is present, whether the regulating commission or the utility makes the adjustment. The fact that the rate is lessened, rather than increased, should not be overlooked.

We are convinced, and so hold, that petitioners to successfully attack an order of the Commission, must show they are aggrieved by the part of the order assailed. We find no prejudice to petitioners in the form which the order took.

---

teenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory.

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature; to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio.

"Times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

Sunshine Coal Co. v. Adkins, 310 U. S. 391:

"Nor does the Act violate the Fifth Amendment. Price control is one of the means available to the state * * * and to the Congress in their respective domains * * * for the protection and promotion of the public welfare of the economy. But appellant claims that this Act is not an appropriate exercise of the Congressional power. It urges that the nature and use of bituminous coal in no wise endangers the health and morals of the populace; that no question of conservation is involved; that the ills of the industry are attributable to overproduction * * *. Those matters, however, relate to questions of policy, to the wisdom of the legislation, and to the appropriateness of the remedy chosen—matters which are not our concern. If we endeavored to appraise them we would be trespassing on the legislative domain. And if we undertook to narrow the scope of federal intervention in this field, as suggested by appellant, we would be blind to at least thirty years of history. * * *

"It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, * * * in this industry. * * * To invalidate this Act we would have to deny the existence of power on the part of Congress under the commerce clause to deal directly and specifically with those forces which in its judgment should not be permitted to dislocate an important segment of our economy and to disrupt and burden interstate channels of trade. * * * The commerce clause empowers it to undertake stabilization of an interstate industry through a process of price-fixing which safeguards the public interest by placing price control in the hands of its administrative representative."

U. S. v. Appalachian Elec. Power Company, decided Dec. 16, 1940.

"In truth the authority of the United States is the regulation of commerce on its waters. * * * That authority is as broad as the needs of commerce. * * * The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment."

III. Existence of Substantial Evidence to support Commission's finding that present rates are unreasonable.

This query bring us to the merits of this appeal—to the heart of the controversy.

The statute (Sec. 19; Title 15, U. S. C. A., Sec. 717 r) provides:

"The finding of the Commission as to facts, if supported by substantial evidence, shall be conclusive."

It also provides that,

"No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing, unless there is reasonable ground for failure so to do."

Petitioners contend that the record is absolutely wanting in any evidence that their existing charges are unreasonable, "unless it be the circumstance that their earnings exceed a 6½% rate of return * * *," and they further contend that returns must be 'enormously disproportionate' before they are even 'some' evidence that the charge yielding the return may be excessive."

They present an amazingly interesting picture of the difficulties of long distance transportation of natural gas, of the tremendous effort, skill, and risk taken by these companies, of the extraordinary improvements necessary in pipe construction and other apparatus, of economic management of business—securing fill-in contracts in slack periods, and maintaining high loads in pipe lines, without which petitioners' business would be on the rocks (or invoking Sec. 77B of the Bankruptcy Act) instead of perplexing commissions and courts with questions arising out of large profits.

They most urgently point out that a profit which exceeds a barely non-confiscatory return is not ipso facto an unreasonable or illegal return.[8] Therefore, the Commission's reduction of profit based solely on a finding of unreasonableness because the profit exceeded said barely non-confiscatory return is without evidentiary support, and the Commission's order must fall.

The Commission answers this argument by pointing out the precedents announced in the Labor Act Cases, specifically the Link Belt Labor Case, decided January 6, 1941, and other Federal Acts involving review of action taken by administrative boards, by courts, and say, if there be any evidence to support

---

[8] Banton v. Belt Line Corp., 268 U. S. 413.

"A commission or other legislative body, in its discretion, may determine to be reasonable and just a rate that is substantially higher than one merely sufficient to justify a finding in a confiscation case that it is high enough to yield a just and reasonable return on the value of the property used to perform the service covered by the rate. The mere fact that a rate is nonconfiscatory does not indicate that it must be deemed to be just and reasonable. It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate."

the finding, it must stand. In fact, it is then removed from the field of judicial inquiry and review.

The Commission also points out that the companies nowhere raised the point of lack of substantial evidence, and so are now (by virtue of the statutory provision in review, above quoted) precluded from so objecting. A complete answer to the contention that the companies failed to object to the substantiality of the evidence to support the finding is to be found in petitioners' assignment of error in their petition for rehearing—

"The Commission erred in finding that the rates and charges presently charged by petitioners are unjust, unreasonable, unlawful and violative of the provisions of the Natural Gas Act."

While the assignment is broad, it is supplemented by others which make it clear, what must have been obvious throughout the many days when testimony was being taken, that petitioners were denying, as a matter of fact, the unreasonableness of the rates in force. Other assignments of error, in the petition for rehearing before the Commission, complained of related points, to-wit:

"The Commission erred in not holding that the proper rate base is the present value of the property, which; under the uncontradicted evidence, is made up of * * *."

Also,

"The Commission erred in holding that the sum of $8,500,000 claimed by applicants as going concern value is an arbitrary claim not supported by substantial evidence.

"It is supported by substantial evidence which is uncontradicted."

Petitioners attack the order because "The Commission is without power and jurisdiction to enter an interim order."

The fatal weakness of this contention lies in counsel's failure to choose a true perspective—make a proper approach to the policy of governmental regulation (as evidenced by this legislation), of the natural gas industry, which includes its production, transportation, and distribution. Like other legislation of this character, it should be liberally construed and interpreted, so as to embrace, within its scope, the implied powers necessary to an exercise of the expressly granted powers. In petitioners' argument, there is a tendency, which is somewhat characteristic of arguments in cases which attack powers of Congress and the procedure of the regulating commission, to observe, "I do not find it written in the bond."

There can be no question that the Act confers upon the Commission the power to make a final order. Had the Commission closed its hearing and then made the order in question, it would have come within its expressly delegated powers.

We take it that this argument goes so far as to deny to the Commission, authority to do anything else; that it could not make an interim order even upon consent of the parties. In other words, if we accept this contention, a hearing might proceed to a point where all the petitioners' testimony was received, and they had rested their case; upon which showing it was conceded an order reducing charges should be made; that the utility's consent thereto was formally given—even then the Commission would be powerless to make an order, because perchance it wished to inquire further into certain practices and charges which affected rates only indirectly, which matters the petitioners were particularly anxious to have settled. Such a holding would do violence to the purpose and object of the legislation.

While the practice and construction of powers of a court of equity are not necessarily controlling, they supply a lamp to guide courts in determining the extent to which they may imply powers from the grant of express powers. Not seriously would it be argued that a court of equity given jurisdiction of a subject and granted the express power to make a final order to fix rates was powerless, on a proper showing, to make an interim order limiting profits.

We must, and do, hold that upon a proper showing, and when the hearing has reached a stage where the Commission may determine that a reduction (or an increase) of rates should be made, it may (and should) make such order, even though the hearing be not completed.

Rate of Return.—Petitioners advance three propositions in respect to the findings and the deductions from said findings of the Commission upon the rate of return. The Commission found a return of 6½% was fair and reasonable. Petitioners say: (a) Their earnings, which exceeded this rate, do not evidence unreasonableness; (b) reasonableness of rates is determined "not by what profit it is reasonable to make, but what it is reasonable to charge for the services rendered;" (c) the rate of return fixed by the Commission at 6½% was, in view of the facts of this case, grossly inadequate.

We reject, without extended discussion, the contentions (a) and (b). They ignore the well-established holdings, backed by reason and experience, to the effect that a fair rate of return, on a fairly established rate base, supplies the correct test of reasonableness.[9] The value of the service to users is neither a reasonable rule, nor supported by judicial decisions.

This seems too elementary to require elaboration or supporting argument. Likewise, it must be apparent, on this theory of cor-

[9] Los Angeles Gas Corp. v. Rd. Com., 289 U. S. 287.

rect rate making, that the rate of return not only may, but, in a utility rate case, must be, the largely determinative factor of reasonableness.

(c) The reasonableness of a 6½% rate of return presents a question altogether different from (a) and (b). It is perplexing and incapable of determination with certainty, in view of the peculiar facts of this case. Out of the mass of decisions pertaining thereto, a rule may be stated with comparative ease, but its application is quite as difficult as the statement is easy.

A fair return is to be largely measured by the usual returns in like investments in the same vicinity over the same period of time.

What are like investments? What are the years we must use to ascertain the going rate of return for said like investment? Relativity seems to be highly present both in the term "like investment" and in the years for which fair earnings must be ascertained.

Ignoring, for the moment, the kind of investment involved, and looking only to rate of return, as such, on investments only, we take judicial notice of the fact that interest rates in most fields have declined in the last decade as much as 75%. For example, call money rates in New York dropped from 8% in 1929 to ⅛–¼ of 1%. Interest rates on Class AAA bonds have dropped enormously. Secure, but less highly rated, bonds have shown a like lowering of interest return.

What years should be chosen to determine the fair rate of yield? More uncertain still, what will the thirteen future years bring forth? Will the rise in rate of return be as great and as rapid as has been the decline during the last decade?

But, if there be doubt and uncertainty as to the correct dates and rates, past and future, for interest charge determination on safe investments, they are inconsequential as compared to the variance in returns on well secured, as compared to returns on highly speculative investments.

The demanded rate of return, since the crash of '29 and the bank failure period immediately following it, has been almost fatal to speculative investments. The investing public has emphasized safety, and shied from the speculative. That the investment in petitioners' enterprise in '32 was highly speculative, can not be successfully gainsaid. A "fair rate of return," on this highly speculative investment, should not be affected by the extraordinary success which has marked its record for the latter part of its existence. The ascertainment of a fair return should be approached as of the year 1932, with the trier looking forward, rather than from the seat in the reviewing stand erected in 1940 and looking backward to 1931.

Even today, with a splendid record of current success behind it, the investment belongs in the speculative class.

This enterprise is based on a deposit of natural gas some four thousand feet beneath the surface of the earth. It is in Texas, some one thousand miles from the consumer. Its successful operation necessitated a capital of from seventy-five to eighty-four million dollars. Its life is limited to the time when the wells will be exhausted. This would be in 1954. At least a tenth of the period was devoted to construction, during which time there was no income.

Upon such a fact statement, and notwithstanding confidence in the expert opinion of geologists, scientists, and engineers may be great, there are factors which necessitate the use of a question mark after many a fact statement or opinion.

The case was one which hardly permitted of enlightenment from expert witnesses, who gave their opinions to the Board (and to us) respecting a fair rate of return. They were overwilling, and the indifference of some of them to opinions expressed by them on other occasions lessened the weight of their evidence.

Moreover, their opinions showed differences were unavoidable and traceable to the varying influences of different factors.

Bearing in mind that our function is to review, not to make, findings of fact, and also keeping to the front the current low rates of return on all investments, and also bearing in mind that the future may bring changes by the Commission in its finding of 6½% as a fair rate of return, we conclude that there is substantial evidence to support the Commission's finding.[10]

Rate Basis.—We now approach petitioners' several contentions respecting the Commission's failure—

(a) to include a sum for going value,

(b) to fix the proper period for amortization,

(c) to make adequate allowance for future capital additions,

(d) to take 2% instead of 6½% interest on the sinking fund.

We need only discuss the first two contentions. If we accept either of them, the order must fall.

The facts are not much in dispute. Petitioners place the lowest figure for going value at $8,500,000. The Commission refused any sum for this factor.

Petitioners contend the amortization period should be fourteen years and five months. The amount to be amortized was $84,341,218. The Commission fixed the amortization period at twenty-three years and the amount to be amortized at $74,420,424.

---

[10] United Gas Public Serv. Co. v. Texas, 303 U. S. 123; West Ohio Gas Co. v. Public Utilities Com., 294 U. S. 63; Driscoll v. Edison Light Co., 307 U. S. 104; Smith v. Ill. Bell Tel. Co., 282 U. S. 133; United Fuel Co. v. Rd. Com., 278 U. S. 300; Dayton Pow. & Light Co. v. Public Utilities Com., 292 U. S. 290; West v. Chesapeake Tel. Co., 295 U. S. 662.

We are persuaded of the soundness of both of petitioners' contentions, (a) and (b).

(a) Going value.—An allowance for going value is necessitated, due to facts peculiar to this case. In the ordinary public utility case, with no unusual fact or circumstance to affect a court's consideration of it, we assume that going value, as a properly includable item in the rate base, should and would be rejected. Driscoll v. Edison Co., 307 U. S. 104, 117. Our duty, to follow the Supreme Court rulings on this and all other questions, necessitates our making all the turns in the road, both left and right, which the teaching of experience has caused our guide to blaze through new and untraveled fields of regulation of quasi-public businesses.

The factors present in the instant case, not found in the old and well-established field of public utility regulation, which affect (b) as well as (a), are: The period of petitioners' life is fixed and rather short; the natural gas field will be exhausted in '54 (the date and the fact are not in dispute). Distinguishably different is the electric light and power field where the life of the enterprise has, in some instances, already exceeded five decades and may go on growing in strength and stability indefinitely. Moreover, great uncertainty marks this 13-year period and the constancy of petitioners' natural gas wells.

Another difference is to be found in the fact that Congress had not declared its public policy to regulate petitioners' business when it started this enterprise. Nor did Congress act until one-third of petitioners' life had expired. During that period, their business was built on the theory that they must find and satisfy their customers—must act on the assumption that rates and volume of business must depend upon and find justification in the future, rather than in the present, business.

Still another difference, however, was the newness of natural gas in Chicago, and therefore the uncertainty of customers and business. Then, too, there were the difficulties incident to the engineering problems, which arose from the task of conveying natural gas one thousand miles over mountains and under rivers to unknown prospective customers. The successful and satisfactory mixing of natural with artificial gas presented, in 1932, problems which the well-established gas companies and their engineers viewed with deepest doubt and dire misgivings.

The losses of the first years supplied persuasive evidence that the investment was highly speculative and an adequate return on the capital invested depended largely upon the business acumen, the engineering skill, and administrative efficiency of their officers, to overcome these losses and develop a profit in this newly regulated

industry. Under such circumstances it seems that fairness necessitates the capitalization and inclusion of such skill—aye, and hazards—as legitimately as the cost of pipes. The natural gas was valueless as it lay in the Texas wells, four thousand feet beneath the surface of the earth, over one thousand miles from Chicago. What gave it value? Not alone pipes to carry it, nor pumps to pump it. It was the courage of the investors, and their willingness to take a chance in a speculative venture, the vision to see and to forecast, the integrity of management, and the knowledge of geologists, etc., which gave to the enterprise its life; and the product of these combined factors made for a going value, which, in the realities of the business world, is justly recognized as part of the value of the investment. It is the existing fact situation peculiar to this case which calls loudly for the inclusion of a sum for going value, as such. Nor can we fairly apply the law save as we first study the facts, and get the proper setting of the natural gas industry in the utility field. The Commission has not included its equivalent in any of the items which went to make up its rate base. If allowable at all, there can be no serious objection to fixing the sum, as the petitioners contend, at $8,500,000.

The Commission argues that in fixing the value of the rate base as high as $74,420,424, it gave full recognition to petitioners' business as a going business concern. This statement is contrary to the memorandum filed by the Commission with its findings. The $74,420,424 was made up of—

Reproduction Cost New of Physical Properties	$56,302,250
Value of Gas Reserves	13,334,775
Capital additions for the period June 1, 1939 to December 31, 1942	3,808,399
Working Capital	975,000
Total Rate Base	74,420,424

The total is the amount which the Commission adopted as its rate base. It does not include going value.

Moreover, in its opinion, the Commission said, "The Companies' claim of $8,500,000 for going concern value must be disallowed. The amount obviously is an arbitrary claim, not supported by substantial evidence warranting its allowance. Its allowance would mean the acceptance of a deceptive fiction resulting in an unfair imposition upon consumers."

In the face of this statement we must assume that the Commission did not allow any sum for going value.

Period of Amortization.—Here, again, we find of dominating importance the newness and lack of precedent among the conditions similar to those found in this industry. In ascertaining petitioners' profits, the amount deducted for amortization is most

important. Petitioners assert the period should be fourteen years five months—the difference between the date of these proceedings and the date when the gas will be exhausted. Respondents, on the other hand, begin their period in 1932. In other words, the Commission adopted a twenty-three year period, whereas petitioners figured on a fourteen year five month period.

In addition to the reasons for our conclusions respecting contention (a), the significance of the date when the business enterprise became subject to governmental regulation is of dominant significance. It is important, too, as bearing on the rate making power of Congress. Avoidance of conflicts with the Fifth Amendment of the Constitution is involved. Petitioners' position avoids the conflicts; respondents' creates an unavoidable clash.

Before Congress enacted this legislation in '38, petitioners were free to contract and did contract with customers on a basis which they deemed wise. After that Act passed, their business, and particularly their rates, were subject to regulation and fixation by respondents. The size of their profits depends upon their earnings for the next thirteen years. These, in turn, depend largely upon the sums allowed for amortization of the value of the property as it then existed and was then valued. Petitioners assert an annual amortization sum of $5,100,732. Respondents fixed the sum at $1,557,852.

The position we take in no wise reflects upon the wisdom of the new legislation. That legislation looks to the future protection of the public. It deals with conditions which existed at the time the legislation was enacted. It neither gave, nor took away, value to going concerns, whose lives were short and limited by fact conditions which neither the producer nor the consumer could change. For these reasons, we conclude the amortization period, for rate making purposes, should be fourteen years, five months, instead of the period of twenty-three years adopted by the Commission.

As was said in United Railways v. West, 280 U. S. 234, "It is the settled rule of this court that the rate base is present value."

See also Brooks-Scanlon Co. v. U. S., 265 U. S. 106, 123; United Fuel Gas Co. v. Railroad Com., 278 U. S. 300.

It would seem to follow logically that if the rate base is determined as of the date of the hearing the amortization period would be for the life of the property from that same date. All the cases dealing with this subject are distinguishable in at least one respect. In the instant case, the end of the period is fixed by the exhaustion of the natural gas wells. In other words, the end is near. In the ordinary electric light, gas, or water rate case, the amortization period is long—covering the life of the pipes—well-nigh a century.

In the absence of authority, it would seem fair and reasonable to fix the amortization period not earlier than the date when Congress subjected the industry to regulation.

Other attacks upon the orders are presented by the petitioners, which we believe it unnecessary to pass upon. The hearing is not completed and some findings of fact may be changed, and the proof may be so conclusive that no attack will then be made.

All such evidence will, of course, be heard and passed upon by the Commission before entering its final order.

The order of the Commission is vacated and set aside.

A true Copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And on the same day, to wit: On the fourteenth day of April 1941, the following further proceedings were had and entered of record, to wit:

Monday, April 14, 1941

Court met pursuant to adjournment

Before Hon. EVAN A. EVANS, Circuit Judge; Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. WALTER C. LINDLEY, District Judge.

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA AND TEXOMA NATURAL GAS COMPANY, PETITIONERS

vs.

FEDERAL POWER COMMISSION AND ILLINOIS COMMERCE COMMISSION, RESPONDENTS

Petition for Review of Interim Order of the Federal Power Commission

This cause came on to be heard on the petition of Natural Gas Pipeline Company of America and Texoma Natural Gas Company for review of an interim rate order of the Federal Power Commission, and on the transcript of the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof: It is ordered and adjudged by this Court that the Order of the Federal Power Commission entered in

this cause on July 23, 1940, be, and it is hereby, vacated and set aside, and that this cause be, and it is hereby, remanded to the said Federal Power Commission for further proceedings in conformity with the Opinion of this Court.

United States Circuit Court of Appeals for the Seventh Circuit

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of order entered on the first day of November 1940, the Opinion filed April 14, 1941, and the Judgment entered on the same date in Cause No. 7454, Natural Gas Pipeline Company of America and Texoma Natural Gas Company, petitioners vs. Federal Power Commission and Illinois Commerce Commission, respondents, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 12th day of June A. D. 1941.

[SEAL]

KENNETH J. CARRICK,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1941

Supreme Court of the United States

No. 265, October Term, 1941

Order allowing certiorari

Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 268, October Term, 1941

Order allowing certiorari

Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit held in the City of Chicago and begun on the first day of October, in the year of our Lord one thousand nine hundred and forty, and of our Independence the one hundred and sixty-fifth.

No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA AND TEXOMA NATURAL GAS COMPANY, PETITIONERS

vs.

FEDERAL POWER COMMISSION AND ILLINOIS COMMERCE COMMISSION, RESPONDENTS

Petition for Review of Interim Order of the Federal Power Commission

And, to wit: On the first day of November 1940, the following further proceedings were had and entered of record, to wit:

Friday, November 1, 1940

Court met pursuant to adjournment

Before Hon. WILLIAM M. SPARKS, Circuit Judge; Hon. J. EARL MAJOR, Circuit Judge; Hon. WALTER E. TREANOR, Circuit Judge.

No. 7439—No. 7454

NATURAL GAS PIPELINE COMPANY OF AMERICA AND TEXOMA NATURAL GAS COMPANY, PETITIONERS

vs.

FEDERAL POWER COMMISSION AND ILLINOIS COMMERCE COMMISSION, RESPONDENTS

Petition for Review of Interim Order of the Federal Power Commission

The Federal Power Commission having overruled petitioners' petition for a rehearing of this cause; and petitioners, within sixty days of that ruling, having filed a written petition in this Court praying that the order of the Commission be modified or set aside in whole or in part—it is therefore ordered by this Court that the order of the Commission herein be stayed until the further

order of this Court, under Section 19 of the Natural Gas Act, 15 U. S. C. 717r (c).

It is further ordered that the temporary restraining, or stay, order, pending petitioners' application for rehearing before the Federal Power Commission, issued August 30, 1940, in cause No. 7439, be and the same is hereby dissolved.

And afterwards, to wit: On the fourteenth day of April 1941, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Seventh Circuit

No. 7454—October Term, 1940, April Session, 1941

NATURAL GAS PIPELINE COMPANY OF AMERICA AND TEXOMA NATURAL GAS COMPANY, PETITIONERS

vs.

FEDERAL POWER COMMISSION AND ILLINOIS COMMERCE COMMISSION, RESPONDENTS

Petition for Review of Interim Order of the Federal Power Commission

April 14, 1941

Before EVANS and SPARKS, Circuit Judges, and LINDLEY, District Judge.

EVANS, Circuit Judge. Presented for review is an interim order of the Federal Power Commission, directing the petitioners to reduce their rates on natural gas, so as to reflect an annual reduction in their operating revenues of not less than $3,750,000.

Petitioners own natural gas reserves in Texas. They produce the natural gas and transport it through their own pipe lines to the State of Illinois, where it is sold wholesale—90% to one customer. They produce 75% of the gas they sell and purchase the remaining 25% from another producer. They were in business for nearly eight years before the Natural Gas Act (15 U. S. C. A. Sec. 717, et seq.[1]) became effective, June 21, 1938.

[1] SECTION 1. (a) As disclosed in reports of the Federal Trade Commission * * * it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) * * * this Act shall apply to the transportation of natural gas * * * to the sale * * * of natural gas for resale for ultimate public consumption for

line to a point near Gray Junction, Oklahoma, where it sells and delivers such natural gas to petitioner Natural Gas Pipeline Company of America. At such point near Gray Junction, Oklahoma, the petitioner last named receives and purchases from petitioner Texoma Natural Gas Company three-fourths of its total market requirements and from Colorado-Interstate Gas Company one-fourth of its total market requirements, and transports such gas in interstate commerce along and through its 24 inch pipeline to Joliet, Illinois, and intermediate points, at which it sells and delivers 98% of such natural gas at wholesale to utilities which in turn resell the same to the public for
2942 domestic, commercial and industrial uses. The remaining 2% of such natural gas the petitioner last named sells directly to industrial users along its pipeline. Petitioners are operated as a single enterprise, and all the profits of the combined operations of petitioners accrue to petitioner Natural Gas Pipeline Company of America, petitioner Texoma Natural Gas Company being operated on a non-profit basis.

V.

Following the enactment of the Natural Gas Act, approved June 21, 1938, respondent Illinois Commerce Commission, purporting to act under Section 13 of the Natural Gas Act (15 U.S.C. 717 1), on or about September 23, 1938, filed with respondent Federal Power Commission a complaint alleging that the rates and charges of petitioners for natural gas sold in the State of Illinois were unjust and unreasonable, requesting that an order be entered directing petitioners to appear and show cause why the rates charged by petitioner Natural Gas Pipeline Company of America to utilities in Illinois should not be reduced, and requesting that an order be entered setting fair, just and reasonable rates for natural gas sold by said petitioner in the State of Illinois.

Respondent Federal Power Commission did not issue a rule on petitioners to show cause why their rates and charges for gas sold in the State of Illinois should not be reduced; but on or about October 14, 1938, it entered an order reciting the filing of the above mentioned complaint and instituting an investigation of petitioners to determine with respect to each of them whether their rates and charges in connection with the transportation and sale of

natural gas subject to the jurisdiction of the Federal Power Commission were unjust, unreasonable, unduly discriminatory or preferential, and, in the event it should find any such rates and charges to be unjust and unreasonable, to determine and fix, by appropriate order or orders, reasonable and non-discriminatory rates and charges.

On November 16, 1938, petitioners filed an answer to said complaint of respondent Illinois Commerce Commis-
2943 sion, in which they denied that the rates or charges for natural gas sold by petitioner Natural Gas Pipeline Company of America to utilities in the State of Illinois are unjust and unreasonable, and denied also other allegations contained in the complaint. In said answer they denied and challenged any jurisdiction, power or authority of respondent Federal Power Commission to enter any order attempting to change, modify or set aside any charge or price for natural gas sold by petitioners to utilities in the State of Illinois or elsewhere, or to substitute or prescribe any different charges or prices therefor, on the ground that petitioners constitute a single enterprise engaged in the business of owning natural gas reserves, developing same through the drilling and equipping of wells thereon, producing natural gas therefrom, transporting same through their own pipelines and facilities to points in the States of Kansas, Nebraska, Iowa and Illinois, and selling such commodity at wholesale to selected distributors and industrial consumers under private contracts; that petitioners' enterprise is of a strictly private character, not affected with a public interest in the sense that Congress would have jurisdiction, power or authority to enact legislation purporting to authorize respondent Federal Power Commission to regulate the prices and charges for which their commodity is sold. Petitioners also alleged that the Natural Gas Act, in so far as it purports to confer on respondent Federal Power Commission jurisdiction or power to change, modify or set aside the charges or prices at which petitioners sell natural gas at wholesale to distributors or to authorize it to set up and prescribe different charges or prices for such commodity, is invalid, and that any rules, regulations or orders promulgated by respondent Federal Power Commission with a view of attempting to exercise any such purported jurisdiction are null and void and unenforcible as against petitioners because the inevitable operation and effect thereof will be to deprive petitioners of their prop-

erty and liberty of contract without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

2944

VI.

On or about April 14, 1939, respondent Federal Power Commission entered an order consolidating for purposes of hearing the complaint and investigation above mentioned and setting a public hearing in the proceedings, to be held before a trial examiner, commencing on May 8, 1939.

VII.

At the opening session of the hearing beginning on May 8, 1939, counsel for respondents called to the stand two witnesses who testified concerning some of the geological, engineering and accounting issues involved. At subsequent sessions of the hearing held from time to time through the summer and fall of 1939, petitioners offered their direct testimony, calling a total of 37 witnesses. Some of these witnesses testified to the facts concerning the history and operation of petitioners' business, the enterprise and pioneering of petitioners in the planning, designing and construction of their pipelines and other facilities, the extraordinarily high stresses and pressures under which petitioners' facilities have been and are operated, the unusually high annual load factor developed and maintained by petitioners in the operation of their business, the extent of their reserves, the geological and engineering conditions under which they produce and will produce their gas through the future life of the field, the effect of the pressures and other geological conditions in the field on the productive capacity of the wells, and the additional capital outlays which petitioners must incur in the drilling and equipping of wells and in the building of field gathering lines, field compressor stations, and other facilities during the future life of the field.

Other witnesses testified to past capital outlays and replacement costs, ultimate salvage values, maintenance and operating expenses, and other necessary and proper expenses incurred and to be incurred in connection with the operation of petitioners' business, and to the sales and earnings by petitioners since the beginning of their

operations and the probable sales and earnings by
2945 petitioners in their operations in the future. Experts testified concerning the cost of reproducing new at the present time the depreciable physical facilities now used by petitioners, the state of depreciation of the existing depreciable facilities, the net figures showing the reproduction cost new less observed depreciation, and the present fair value of petitioners' gas reserves in their depleted condition.

Experts testified to the going concern value of petitioners' properties, to the actual cost of acquiring such going concern value, and to the cost of reproducing it at the present time.

Several witnesses testified to various mechanical risks and hazards inherent in the natural gas business and to those special hazards confronting petitioners by reason of the operation of their facilities under the extremely high pressures and tensions and the topography of the country traversed by petitioners' lines. Other risks and hazards confronting generally those engaged in the natural gas business, and petitioners in particular, were pointed out in the testimony.

Other witnesses testified to the proper method of handling a sinking fund looking to its ultimate return with interest to petitioners at the time their reserves shall be exhausted, and pointed out the types of securities available for such investment and the yields which could be obtained through the investment of funds in such securities.

Petitioners caused an exhibit to be prepared and offered in evidence, summarizing the figures showing the total amount invested and to be invested, the total charges for maintenance, operations and other costs, including taxes incurred and to be incurred, the revenues received and to be received over the entire life of the project, beginning on January 1, 1932, and ending with the year 1954, the latest year through which petitioners will have gas available from their reserves under the most favorable circumstances, from which it appeared that over the whole period petitioners will have earned an amount which, after returning to them their total investment and all operating costs and
expenses, will yield them a return on their average
2946 investment of only 6.39% per annum. This exhibit was offered as showing that, over the whole period covered by the limited life of petitioners' business, peti-

tioners' prices and charges for natural gas are not unjust and unreasonable.

Petitioners offered another exhibit, summarizing the figures showing the reproduction cost new less observed depreciation of the physical properties other than gas reserves, the present fair value of the gas reserves, the going concern value of petitioners' properties, the cost of future additional capital assets and of capital replacements, the ultimate salvage value of the properties, the necessary working capital, the expense of maintaining and operating petitioners' facilities and conducting their business in the past and in the future, the past and prospective revenues, and other pertinent figures, from which it appeared that petitioners probably will earn over the future life of their reserves, after a proper allowance for the amortization of the present value of their properties, a return on the proper rate base of 4% per annum.

Petitioners offered another exhibit showing substantially the same figures as the exhibit last described except that, as pointing to the present fair value of petitioners' properties, they showed the original cost of the present properties instead of the reproduction cost new less observed depreciation of the properties other than gas reserves and the present fair value of the gas reserves. The figures used as a basis of this exhibit show that, after setting aside an amount each year sufficient to return the present value of the properties by the time petitioners' reserves of gas are exhausted, petitioners will receive an annual return on the proper rate base of 5.1% per annum.

These exhibits, in so far as they deal with the future, were based on figures developed through the testimony of experts who testified concerning the necessary expenditures and the probable revenues during the future life of petitioners' reserves. The figures dealing with going concern value were those developed by the witnesses who testified on that subject. The annual allowance for amortization was calculated on a sinking fund formula, using the
2947 compound interest rate to which the witnesses testified as the return which petitioners could reasonably expect from the investment of their sinking fund allowances in the highest types of securities.

Four expert witnesses were called by petitioners to testify on the subject of rate of return. These witnesses, after testifying at great length and after producing and

introducing a large number of statistical tabulations, graphs and charts, and after testifying at length concerning the risks involved in petitioners' business and the reaction of the investing public to such risks as shown by the figures, charts and graphs contained in the exhibits produced by the witnesses, arrived at the opinion that a minimum of 8% per annum would be a fair and reasonable return to petitioners on the fair value of their property. Two of these witnesses testified that 8% would not be an adequate return and expressed their judgment that a higher rate of return would be required.

VIII.

On October 6, 1939, petitioners announced that they had concluded their direct testimony. Thereafter counsel for respondents, after cross examining seven of petitioners' witnesses, including the four experts who had testified on rate of return, called to the stand four witnesses, two of whom were employees of respondent Federal Power Commission and the other two employees of respondent Illinois Commerce Commission, who testified to statistics and produced statistical exhibits dealing with interest rates, cost of financing through issuance of securities, and other matters ordinarily offered in connection with rate of return studies. Two of these witnesses confined their testimony to statistical facts without undertaking to appraise or analyze their testimony and apply it to the subject of rate of return. Another testified to his conclusion as to the cost of refinancing petitioners' properties. The fourth witness, an employee of respondent Illinois Commerce Commission, testified to a conclusion that 6% per annum on the present fair value of petitioners' properties would be a reasonable return. These four witnesses were later cross examined by petitioners at a session of the hearing concluded on
2948 December 14, 1939, at which session petitioners also offered some testimony on redirect examination of two of their witnesses on rate of return. Subsequently, at a session of the hearing held on January 8, 9 and 10, 1940, petitioners offered redirect testimony by two of their witnesses on rate of return and some testimony in rebuttal of the testimony offered by respondents on that subject.

IX.

On November 7, 1939, at the conclusion of the direct examination by counsel for respondents of their four witnesses who testified on the subject of rate of return, but prior to the cross-examination of such witnesses by petitioners and prior to the offering of any redirect or rebuttal testimony by petitioners on the subject of rate of return, counsel for respondents filed with the Examiner as a part of the record a motion for an immediate interim order by respondent Federal Power Commission setting up rates and charges that would operate to reduce the revenues of petitioners by a sum of $3,000,000 to $3,500,000 annually. At the time such motion was offered, counsel for respondents announced that they were not resting their case. In the motion counsel for respondents stated that the cross-examination of petitioners' witnesses, the introduction of respondents' evidence, the taking of petitioners' rebuttal evidence and cross-examination thereon will consume much additional time, so that the closing of the case will be delayed for a long time in the future.

X.

Pursuant to the direction of respondent Federal Power Commission, said motion for interim order was set for argument before respondent Federal Power Commission as a whole on December 18, 1939, on which date petitioners appeared and filed pleas to the jurisdiction of respondent Federal Power Commission to enter an interim order, and also a conditional answer in reply to said motion for interim order. Respondent Federal Power Commission denied a request by petitioners that they be permitted to present their pleas to the jurisdiction before the hearing on the motion and that they be allowed to open and
2949 close the argument on such pleas. In that connection counsel for petitioners pointed out to said respondent that they had had no opportunity to prepare themselves for argument on the merits of the motion, due to the circumstance that they had been continuously engaged in preparing and offering their testimony before the Examiner from the time said motion was filed. Counsel for respondents presented their arguments in support of the motion for interim order and petitioners were heard in reply on their

pleas to the jurisdiction. On the same date petitioners filed their brief in support of their pleas to the jurisdiction.

Later counsel for respondents filed their briefs in support of the motion and petitioners filed their brief in reply.

No further proceedings were had in the hearing subsequent to January 10, 1940, until July 23, 1940, on which date respondent Federal Power Commission issued a written opinion and an interim order, which it caused to be served on petitioners on August 1, 1940, the effect of which was to direct petitioners, prior to August 15, 1940, to file new schedules of rates and charges for gas sold at wholesale which would operate to reduce petitioners' net revenues available for amortization and return by the sum of at least $3,750,000 per annum, which new rates and charges should be effective as to all bills regularly rendered on or after September 1, 1940. Prior to the issuance of such opinion and order petitioners had no notice of the contents or effect thereof, no report of the Examiner to respondent Federal Power Commission on the issues of law or of fact ever having been submitted to petitioners.

XI.

On August 8, 1940, petitioners filed with respondent Federal Power Commission their verified motion for a stay of the order of said respondent dated July 23, 1940, pending the filing of petitioners' motion for rehearing and the action of said respondent thereon. On the same date said respondent entered an order denying said petition in all things except that the time for the filing of new schedules of rates and charges was extended to on or before September 1, 1940.

2950

XII.

On August 19, 1940, petitioners filed with respondent Federal Power Commission their application for rehearing, in which they set forth specifically the grounds upon which said application was based.

XIII.

On the 6th day of September, 1940, said respondent entered an order denying petitioners' application for rehearing, which order was served on petitioners on September 9, 1940.

XIV.

Pursuant to Section 19(b) of the Natural Gas Act (15 U. S. C. 717r(b)), petitioners present their petition for a review of said order of respondent Federal Power Commission issued July 23, 1940, as modified by the order of said respondent dated August 8, 1940, together with a statement of the points upon which petitioners rely as grounds for a decree of this Court reversing, setting aside and annulling said order of respondent Federal Power Commission. All the points submitted herewith as grounds for reversing, setting aside and annulling said order were urged before respondent Federal Power Commission in the application for rehearing submitted by petitioners to said respondent as aforesaid. Reference is here made to the statement of points attached hereto, which is made a part of this petition.

XV.

For the reasons expressly set forth in the statement of points attached hereto, said order of respondent Federal Power Commission, as modified, is erroneous and operates, and will continue to operate, to confiscate petitioners' property, property rights and revenues and to take petitioners' property, property rights and revenues without due process of law, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States; and, for the reasons set forth in said statement of points, said order, as modified, should be reversed, set aside and held for naught.

2951 Wherefore petitioners pray:

(a) That a copy of this petition forthwith be served upon some member of respondent Federal Power Commission in pursuance of Section 19(b) of the Natural Gas Act (15 U. S. C. 717r(b)), and upon respondent Illinois Commerce Commission;

(b) That respondent Federal Power Commission be equired, in conformity with the Natural Gas Act, to certify and file with the Court a transcript of the record upon which the order complained of in this petition was entered, including the testimony, evidence and exhibits admitted, pleadings, opinion, findings, conclusions, and orders of said respondent in the proceedings above referred to;

(c) That this Honorable Court review the proceedings,

including the testimony, evidence and exhibits admitted, pleadings, opinion, findings, conclusions and orders in the proceedings out of which the said order of July 23, 1940, issued;

(d) That said order of July 23, 1940, in so far as it purports to direct that the rates and charges made, demanded or received by petitioners for or in connection with their transportation and sale of natural gas in interstate commerce for resale for ultimate public consumption shall be reduced to reflect a reduction of not less than $3,750,000 per annum in the operating revenues of petitioner Natural Gas Pipeline Company of America, and in so far as it, as modified, directs that petitioners shall file on or before September 1, 1940, new schedules of rates and charges which shall reflect such reduction in operating revenues, be reversed, set aside and held for naught;

(e) That this Honorable Court exercise its jurisdiction over the parties and subject matter of this petition and grant to petitioners such other and further relief in the premises as the rights and equities of the cause may show to be necessary and proper.

2952 Natural Gas Pipeline Company of America
and Texoma Natural Gas Company,
Petitioners,

By J. J. Hedrick,
20 North Wacker Drive, Chicago, Ill.,
George I. Haight,
209 South LaSalle St., Chicago, Ill.,
S. A. L. Morgan,
20 North Wacker Drive, Chicago, Ill.,
Attorneys for Petitioners.

Haight, Goldstein & Hobbs,
209 South LaSalle St.,
Chicago, Ill.,
Morgan, Culton, Morgan & Britain,
Amarillo, Texas,
Of Counsel.

State of Illinois, }
County of Cook. }

Floyd C. Brown, being duly sworn, makes the following statement on oath: that he is the Vice President and General Manager of Natural Gas Pipeline Company of America and Texoma Natural Gas Company, petitioners named

in the above and foregoing petition; that he has read said petition and that the statements of fact therein contained are true.

Floyd C. Brown.

Subscribed and sworn to before me this 11th day of September, 1940.

Esther M. Wilson,
Notary Public, Cook County, Illinois.

(Seal)

My Commission Expires May 27, 1943.

2953 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit,

October Term, 1940.

Natural Gas Pipeline Company of America and Texoma Natural Gas Company,
Petitioners,
vs.
Federal Power Commission and Illinois Commerce Commission,
Respondents.
} No. .....

STATEMENT OF POINTS.

To Said Honorable Court:

Pursuant to Paragraph 3 of Rule 36 of this Court, petitioners, Natural Gas Pipeline Company of America and Texoma Natural Gas Company, in connection with their petition for review of an order of respondent Federal Power Commission dated July 23, 1940, as modified by an order dated August 8, 1940, file the following statement of points on which they rely as grounds for reversing and setting aside said order. These points, numbered consecutively from 1 to 37, inclusive, were all urged in the same order as objections or assignments of error before respondent Federal Power Commission in petitioners' application for rehearing filed with said respondent on August 19, 1940.

Respondent Federal Power Commission will be referred

to hereafter as the Commission; and respondent Illinois Commerce Commission will be referred to as complainant.

2954

Point 1.

The Commission erred in holding that it has authority under the Natural Gas Act to change, modify or set aside the charges and prices at which petitioners are selling natural gas in interstate commerce at wholesale, it appearing from the record without contradiction that petitioners, constituting a single enterprise, are engaged in the business of owning natural gas reserves in the State of Texas, developing such reserves through the drilling and equipping of wells thereon, producing natural gas therefrom in quantities equal to three-fourths of their total market requirements, purchasing gas from others in quantities equal to one-fourth of their market requirements, transporting the gas so produced and purchased through their own pipelines and facilities to points in the States of Kansas, Nebraska, Iowa and Illinois, and selling such commodity at wholesale to selected distributors and industrial consumers under private contracts; that their business is of a strictly private character, not affected with a public interest in the sense that Congress would have jurisdiction, power or authority to enact legislation purporting to authorize the Commission to regulate the charges or prices for which such commodity is sold; and that the necessary operation of any order purporting to reduce, change or modify such charges would deprive petitioners of their property and liberty of contract without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. (Commission's memorandum opinion No. 49, p. 9; Commission's order reducing rates, finding No. 6, p. 3.)

Point 2.

The Commission erred in overruling petitioners' second plea to the jurisdiction of the Commission dated December 18, 1939, and in holding that it has jurisdiction under the Natural Gas Act to reduce the prices at which petitioners are selling natural gas, by interim order or otherwise, pending the final termination of the proceedings and hearing now pending before the Commission and its Examiner,

and pending a finding by the Commission, after the conclusion of the hearing and after petitioners have had an opportunity to be heard on their briefs and arguments on the facts presented by the whole record and the law applicable thereto, that the rates and prices charged and collected by petitioners are unjust, unreasonable, unduly discriminatory or preferential. (Commission's memorandum opinion No. 49, pp. 10-13.)

Point 3.

The Commission erred in holding that under the Natural Gas Act it has power and jurisdiction to enter an interim order pending the final termination of the hearing now pending and an opportunity by petitioners to be heard by brief and oral argument on the law and the facts presented by the whole record, since no such power or jurisdiction is conferred upon the Commission by the Natural Gas Act, either in express terms or by necessary implication. (Commission's memorandum opinion No. 49, pp. 10-13.)

2955 Point 4.

The Commission erred in holding that in these proceedings petitioners have had a hearing within the meaning of Section 5(a) of the Natural Gas Act (15 U.S.C., 717d(a)), which provides that "whenever the Commission, after a hearing * * * shall find that any rate, charge, * * * is unjust, unreasonable, * * * the Commission shall determine the just and reasonable rate, charge, * * * and shall fix the same by order." (Commission's memorandum opinion No. 49, pp. 10-13.)

Point 5.

The Commission erred in denying the request of petitioners that the issues of fact and of law raised by the motion on which the Commission's order of July 23, 1940, is based and by the briefs in support thereof be referred to the Examiner for a very careful analysis and consideration after receiving briefs and oral argument from counsel for the interested parties, and that the Commission have the formal recommendations of the Examiner on the issues, both of fact and of law, and the exceptions of petitioners

thereto, if any, before the Commission should consider the entering of an interim order reducing petitioners' revenues.

Point 6.

The Commission erred in not holding that the burden of proof rests upon complainant and counsel for the Commission to establish that petitioners' existing charges are unjust and unreasonable, and that such burden has not been discharged.

Point 7.

The Commission erred in not holding that when and if complainant and counsel for the Commission discharged their burden of showing that petitioners' rates and charges are unjust and unreasonable, the burden was then upon complainant and counsel for the Commission to show what rates and charges would be just and reasonable, and that such second burden has not been discharged.

Point 8.

The Commission erred in finding that the rates and charges presently charged by petitioners are unjust, unreasonable, unlawful and violative of the provisions of the Natural Gas Act. (Commission's memorandum opinion No. 49, p. 26; Commission's order reducing rates, finding No. 18, p. 4.)

Point 9.

The Commission erred in establishing the following rate base:

2956 Reproduction cost new of physical properties (exclusive of gas reserves as of June 1, 1939)	$56,302,250
Value of gas reserves as of June 1, 1939	13,334,775
Capital additions from June 1, 1939, to December 31, 1942	3,808,399
Working capital	975,000
Rate base	$74,420,424

(Commission's memorandum opinion No. 49, p. 19; Commission's order reducing rates, finding No. 8, p. 3.)

Point 10.

The Commission erred in not allowing as the proper rate base the items and amounts set out in petitioners' reply brief dated February 15, 1940, p. 251, as follows:

Reproduction cost new exclusive of gas reserves	$56,302,250
Less "viewed" depreciation	2,866,758
Present value of physical properties exclusive of gas reserves	$53,435,492
Present value of gas reserves	13,334,775
Allowance for future capital expenditures	6,046,286
Going concern value	8,500,000
Working capital	975,000
Rate base	$82,291,553

Point 11.

The Commission erred in not holding that the proper rate base is the present value of the property, which, under the uncontradicted evidence, is made up of the reproduction cost new less viewed or actual depreciation of the depreciable properties, the value of the gas reserves, the going concern value, the working capital, and a proper allowance for future capital expenditures aggregating $82,291,553. (Defendants' reply brief dated February 15, 1940, p. 251.)

Point 12.

The Commission erred in attempting to apply its own theory as to undepreciated rate base by placing on the gas reserves the present value of those reserves in their depleted condition. (Defendants' reply brief dated February 15, 1940, pp. 144-161.)

2957

Point 13.

The Commission erred in making no allowance for going concern value in fixing the rate base and in fixing the amount to be amortized. (Commission's memorandum opinion No. 49, p. 19.)

Point 14.

The Commission erred in holding that the sum of $8,500,000 claimed by petitioners as going concern value is an arbitrary claim not supported by substantial evidence, it appearing from the uncontradicted evidence that said sum of money represents the aggregate of expenditures actually made and costs actually sustained in developing the market outlets for petitioners' gas up to the normal capacity of the lines; that such expenditures and costs were reasonable; and that at least that amount would have to be expended in attaching business if petitioners were now at the beginning of their operations. (Commission's memorandum opinion No. 49, p. 19.)

Point 15.

The Commission erred in reducing the amount allowed for future capital expenditures from $6,046,286, as claimed by petitioners, to $3,808,399, thus eliminating from the amount allowed all future capital expenditures after December 1, 1942, it appearing from the uncontradicted evidence that the amounts claimed by petitioners for capital expenditures after the date last mentioned certainly and definitely will be made and that the property acquired through such expenditures will be devoted to petitioners' business. (Commission's memorandum opinion No. 49, pp. 17, 18 and 19; Commission's order reducing rates, finding No. 8, p. 3.)

Point 16.

The Commission erred in holding that the total investment, by which it manifestly means original cost, in contradistinction to fair value, less the salvage value at the end of petitioners' business, should be amortized. (Commission's memorandum opinion No. 49, pp. 20 and 21.)

Point 17.

The Commission erred in holding that the proper amount to be amortized is $78,284,009. (Commission's memorandum opinion No. 49, p. 21; Commission's order reducing rates, finding No. 9, p. 3.)

Point 18.

The Commission erred in not holding that the proper amount to be amortized is $84,341,218, representing the present fair value of petitioners' present properties, including going concern value and working capital, plus future expenditures for additional capital assets, less the liquidating salvage value at the end of the project's life. (Commission's memorandum opinion No. 49, pp. 20-22.)

2958

Point 19.

The Commission erred in holding that the proper amortization period should be the total estimated life of the business, namely, 23 years from the beginning of 1932 to the end of 1954. (Commission's memorandum opinion No. 49, pp. 20-21; Commission's order reducing rates, finding No. 10, p. 3.)

Point 20.

The Commission erred in not holding that the proper amortization period should be the period intervening from the present time to the end of the project's life, which, under the uncontradicted evidence, will be sometime prior to December 31, 1954. (Commission's memorandum opinion No. 49, p. 20.)

Point 21.

The Commission erred in holding that the annual allowance for amortization should be calculated on a sinking fund basis, with interest credited to the amortization reserve at the rate of 6½% per annum, compounded annually. (Commission's memorandum opinion No. 49, pp. 21-22; Commission's order reducing rates, finding No. 11, p. 3.)

Point 22.

The Commission erred in not holding, under the uncontradicted evidence, that the annual allowance for amortization should be calculated on a straight line basis, or in any event on a sinking fund basis with interest credited to the amortization reserve at the rate of 2% per annum, compounded semi-annually. (Commission's memorandum opinion No. 49, pp. 21-22.)

Point 23.

The Commission erred in holding that it is fair and equitable, in computing the amortization to be charged as an operating expense under the sinking fund of formula, to use an interest rate of 6½%, the allowed rate of return. (Commission's memorandum opinion No. 49, pp. 21-22.)

Point 24.

The Commission erred in not holding that in computing the annual reserve for amortization an interest rate of not more than 2% per annum, compounded semi-annually, should be used. (Commission's memorandum opinion No. 49, pp. 21-22.)

Point 25.

The Commission erred in holding that as an annual reserve for amortization the sum of only $1,557,852 should be allowed. (Commission's memorandum opinion No. 49, pp. 22 and 26; Commission's order reducing rates, finding No. 12, p. 3, and finding No. 14, p. 4.)

2959 Point 26.

The Commission erred in not holding that the proper annual allowance for amortization is at least $5,100,732.

Point 27.

The Commission erred in eliminating from the allowance for operating expenses the items representing replacements of capital assets subsequent to August 1, 1940, in an amount averaging $188,054 per annum. The estimated cost of these items is included in the $78,284,009 erroneously allowed by the Commission as the proper amount for amortization. However, in estimating petitioners' average income available for amortization and return for the period from August 1, 1940, to and including December 31, 1942, the Commission disregarded the estimated cost of replacements during that period. Petitioners point out that the Commission failed to include such costs among the operating expenses, thus under its own theory arriving at an

amount $188,054 greater than the correct amount available for amortization and return under such theory.

Point 28.

The Commission erred as a matter of law in finding that 6½% per annum on the rate base allowed is a fair rate of return for petitioners, there being no substantial evidence to support the finding. The allowed rate of return purports to cover only the cost of capital, based on the testimony of an employee of the Commission whose conclusion on that point is not supported by his own factual premise. No allowance is made for efficiency and skill in design and engineering, through which petitioners are able to operate their facilities under extraordinarily high stresses and to transport gas at extraordinarily high pressures, and efficiency in management in attaining and maintaining an average load factor more than 30% higher than that ordinarily attained by other pipelines, which efficiency and skill account for at least $1,200,000 of petitioners' annual revenues, according to the uncontradicted testimony. (Commission's memorandum opinion No. 49, pp. 23-26; Commission's order reducing rates, finding No. 13, p. 3.)

Point 29.

The Commission erred in not finding that the fair rate of return for petitioners is not less than 8%.

Point 30.

The Commission erred in holding that the annual amount necessary for a fair return to petitioners is not more than $4,837,328 and that the proper allowance for amortization is $1,557,852, or a total of $6,395,180 for fair return and amortization. (Commission's memorandum opinion No. 49, p. 26; Commission's order reducing rates, finding No. 14, p. 4.)

2960 Point 31.

The Commission erred in finding that petitioners' annual net revenues available for amortization and return exceed the amount reasonably necessary by $2,966,852. (Commis-

sion's memorandum opinion No. 49, p. 26; Commission's order reducing rates, finding No. 16, p. 4.)

Point 32.

The Commission erred in ordering that the rates and charges made, demanded or received by petitioners in connection with their transportation and sale of natural gas shall be reduced to reflect a reduction of not less than $3,750,000 per annum in the operating revenues of Natural Gas Pipeline Company of America. (Commission's memorandum opinion No. 49, p. 26; Commission's order reducing rates, paragraph (A), p. 4.)

Point 33.

The Commission erred in finding that the rates and charges after reflecting the reductions ordered will be just and reasonable. (Commission's order reducing rates, finding No. 19, p. 4.)

Point 34.

The Commission erred in ordering that petitioners file new schedules of rates and charges to reflect a reduction of not less than $3,750,000 per annum in the operating revenues of Natural Gas Pipeline Company of America effective as to all bills regularly rendered on or after September 1, 1940. (Commission's order reducing rates, paragraph (B), p. 4; Commission's order dated August 8, 1940, paragraph (A).)

Point 35.

The Commission erred in ordering that from and after the effective date of the new schedules ordered to be filed petitioners shall cease and desist from making, demanding or receiving any rates and charges which do not reflect the reduction ordered in Paragraph (A) of the Commission's order reducing rates. (Commission's order reducing rates, Paragraph (D), p. 5.)

Point 36.

The Commission erred in denying petitioners' application for a stay of the Commission's order dated July 23, 1940, pending the filing of an application for rehearing and the disposition of such application, and, in the event such application be denied, pending the review of said order by the courts on appeal. (Defendants-respondents' motion for stay filed August 8, 1940; Commission's order denying in part the motion for stay, dated August 8, 1940, Paragraph (b).)

Point 37.

The Commission erred in denying petitioners' application for rehearing. (Commission's order dated September 6, 1940.)

2961 Respectfully submitted,

Natural Gas Pipeline Company of America and Texoma Natural Gas Company,

Petitioners,

By J. J. Hedrick,
20 North Wacker Drive, Chicago, Ill.
George I. Haight,
209 South LaSalle St., Chicago, Ill.
S. A. L. Morgan,
20 North Wacker Drive, Chicago, Ill.

Attorneys for Petitioners.

Haight, Goldstein & Hobbs,
209 South LaSalle St.,
Chicago, Ill.
Morgan, Coulton, Morgan & Britain,
Amarillo, Texas,

Of Counsel.

Endorsed: Filed Sep. 11, 1940. Kenneth J. Carrick, Clerk.

Filed Nov. 5, 1940.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

* * (Caption—7454) * *

STIPULATION FOR PRINTED RECORD.

Now come Natural Gas Pipeline Company of America and Texoma Natural Gas Company, petitioners, and the Federal Power Commission and Illinois Commerce Commission, respondents, and stipulate as follows:

The following documents shall be included in the printed record:

1. Pages 3 to the end of line 1 on page 64 of the official stenographer's report before the Federal Power Commission in Docket Nos. G-109 and G-112, now on file with this Court.

2. Pages 1 to 899, inclusive, of the narrative statement captioned "Abstract of Testimony."

3. Pages 4243, beginning with line 18, to page 4266, ending with line 6, of the official stenographer's report referred to in Paragraph 1 above.

4. Pages 900 to 1533, ending with line 20, of the narrative statement referred to in Paragraph 2 above.

5. Pages 8077, beginning with line 10, to page 8084, ending with line 2, of the official stenographer's report referred to in Paragraph 1 above.

6. Pages 1534 to 1816, ending with line 13, of the narrative statement referred to in Paragraph 2 above.

7. Pages 9736, beginning with line 12, to page 9740, ending with line 13, and pages 9890, beginning with line 21, to page 9892, ending with line 18, of the official stenographer's report referred to in Paragraph 1 above.

8. Pages 1816, beginning with line 14, to page 1922, inclusive, of the narrative statement referred to in Paragraph 2 above.

9. Pages 10390, beginning with line 14, to page 10394, ending with line 2, of the official stenographer's report referred to in Paragraph 1 above.

10. The letter dated January 20, 1940, by the Examiner sustaining the objection of counsel for the Commission and complainant to petitioners' (defendants') offer in evidence of the material shown at pages 10390 to 10394 of the official stenographer's report.

11. Pages 1923 to 1936, inclusive, of the narrative statement referred to in Paragraph 2 above.

12. Motion for interim order filed with the Commission by counsel for complainant and the Commission on November 7, 1939.

13. Pleas to the jurisdiction of the Commission filed by petitioners (defendants) with the Commission on December 18, 1939.

14. Conditional answer to motion for interim order filed with the Commission by petitioners (defendants) on December 18, 1939.

15. Opinion and order of the Commission dated July 23, 1940.

16. Motion for stay filed by petitioners (defendants) with the Commission on August 8, 1940.

17. Objections of Illinois Commerce Commission to granting of respondent's motion for a stay of the Commission's order of July 23, 1940, filed August 23, 1940.

18. Order of the Commission dated August 8, 1940.

19. Application for rehearing filed by petitioners (defendants) with the Commission on August 19, 1940, including verification filed August 23, 1940.

20. Order of the Commission overruling application for rehearing entered September 6, 1940.

21. Petition for review filed in this court on September 11, 1940, in cause No. 7454.

22. Exhibits Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 28, 36, 41, 43, 44, 53, 54, 78, 79, 84, 85, 86, 92, 114, 116, 117, 122, 123, 124, pages 1, 2 and 3 of 125, 129, 130, summary sheet of 131, 132, 133, 134, 136, 137, 138, 140, 141, 142, 145, 146, 147, 148, 149, 150, 151, 152, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 167, 168, 169, 170, 171, 172, 173, 174, 176, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 191, 192, 193, 195, 196, 197, 198, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, and 211.

23. This stipulation.

It is expressly stipulated that in the event any of the parties hereto shall find it necessary or proper to appeal to the official transcript filed with the Court by the Commission, the filing of this stipulation and the printed record in pursuance hereof shall in no wise prejudice its right to do so. In the event of controversy as to construction of any part of the narrative included in the record to be printed,

it is expressly stipulated that the official transcript shall govern.

Natural Gas Pipeline Company of America and
Texoma Natural Gas Company, Petitioners,
By J. J. Hedrick,
Geo. I. Haight,
S. A. L. Morgan,
Attorneys,
Federal Power Commission,
By Wm. S. Youngman, Jr.,
General Counsel,
Richard J. Connor,
Assistant General Counsel,
George Slaff,
Attorney,
Daryal A. Myse,
Attorney,
Illinois Commerce Commission,
By John E. Cassidy,
Attorney General of Illinois,
Harry R. Booth,
Assistant Attorney General,
Respondents.

Approved: Sparks, C. J.
Nov. 7, 1940.

Endorsed: In the United States Circuit Court of Appeals. * * (Caption—7454) * * Stipulation for Printed Record. Filed Nov. 5, 1940. Kenneth J. Carrick, Clerk.

EXHIBIT NO. 5.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.
* * (Caption—7454) * *

SUPPLEMENTAL STIPULATION FOR PRINTED RECORD.

Now come Natural Gas Pipeline Company of America and Texoma Natural Gas Company, petitioners, and the Federal Power Commission and Illinois Commerce Commission, respondents, and stipulate that the following portions of the Exhibits to be printed pursuant to the Stipulation for Printed Record filed in this court on November 6, 1940, shall be omitted:

1. Picture and name and all material except the lower

half of columns 2 and 3, beginning with printed matter entitled, "Expanding Markets for Gas Industry Make Investments Sound" in Exhibit No. 170.

2. All of column 1, page 3 (numbered 37) in Exhibit No. 171.

3. The picture and name on page 1; the lower half of columns 1 and 2 beginning with title "Transparent Kitchen To Use Gas," the paragraph in column 2 entitled, "Name Change", and all of column 3 including the picture, on page 2 in Exhibit No. 172.

4. All of page 3 except article continued on lower half of column 3 entitled, "A Stock Broker Analyzes The Natural Gas Industry," in Exhibit No. 173.

5. Picture and name on page 1 and all of material in columns 2 and 3 under title of "Plumber-Utility Cooperative Sales in Connecticut Drop in 1938," in Exhibit No. 176.

6. All of page 2 (numbered 33) except the article continued in the lower half of columns 2 and 3 under the title of "Investment Opportunities," in Exhibit No. 178.

Natural Gas Pipeline Company of America and
Texoma Natural Gas Company,
Petitioners,

By J. J. Hedrick,
Geo. I. Haight,
S. A. L. Morgan,
Attorneys.

Federal Power Commission,
By Wm. S. Youngman, Jr.,
Richard J. Connor,
Assistant General Counsel.
George Slaff,
Attorney.
Daryal A. Myse,
Attorney,

Illinois Commerce Commission,
By John E. Cassidy,
Attorney General of Illinois,
Harry R. Booth,
Assistant Attorney General.
Respondents.

Endorsed: In the United States Circuit Court of Appeals. • • (Caption—7454) • • Supplemental Stipulation for Printed Record. U. S. C. C. A.—7 Filed Nov 13 1940 Kenneth J. Carrick, Clerk.